

Supreme Court, U. S.
FILED

SEP 28 1976

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

October Term, 1976

No. **76-4471**

WILLIAM G. MILLIKEN; Governor of the State of Michigan; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan, and ALLISON GREEN, Treasurer of the State of Michigan,

Petitioners,

- vs -

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having
(Continued on Inside Front Cover)

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

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Dated: September 24, 1976.

children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976
No.

WILLIAM G. MILLIKEN, et al,
Petitioners,

v

RONALD BRADLEY, et al,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

Petitioners William G. Milliken, Governor of the State of Michigan; Frank J. Kelley, Attorney General of the State of Michigan; Michigan State Board of Education, a constitutional body corporate; John W. Porter, Superintendent of Public Instruction of the State of Michigan, and Allison Green, Treasurer of the State of Michigan, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 4, 1976.

OPINIONS AND ORDERS OF THE COURTS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix to Petition, filed herewith, at pages 151a-190a.¹

¹ Hereafter, references to the Appendix to Petition will be indicated by page numbers enclosed in parentheses.

Other Opinions and Orders delivered in the Courts below are:

United States District Court for the Eastern District of Michigan, Southern Division:

May 21, 1975, Order for Acquisition of Transportation, not reported. (1a-2a).

August 14, 1976, Memorandum, Opinion and Remedial Decree (Findings of Fact and Conclusion of Law), 402 F Supp 1096. (7a-88a).

August 15, 1975, Partial Judgment and Order, not reported. (89a-101a).

November 4, 1975, Memorandum and Order [Desegregation Plan], 411 F Supp 943. (103a-111a).

November 20, 1975, Order [Desegregation Plan], not reported. (113a).

May 11, 1976, Memorandum, Order, and Judgment [Educational Components], not reported. (115a-144a).

May 11, 1976, Judgment [Educational Components], not reported. (145a-149a).

United States Court of Appeals for the Sixth Circuit:

June 19, 1975, Order [Acquisition of Transportation], 519 F2d 679. (3a-6a).

August 4, 1976, Notice of Entry of Judgment, not reported. (191a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 4, 1976. (191a). This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I.

Whether, in the absence of any finding of a constitutional violation with respect to educational programs in the Detroit school system, the lower courts exceeded the limits of their authority in the remedy proceedings of this school desegregation case by ordering a system wide expansion of existing educational programs in the Detroit schools?

II.

Whether, in the absence of any finding of a constitutional violation with respect to Michigan's system of financing public education, the lower courts' decisions compelling defendants in the executive branch of state government to pay out 5.8 million dollars, or more, in additional, unappropriated funds from the State Treasury to defray the cost of court ordered educational program expansion in the Detroit school system are contrary to the Constitution and the decisions of this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X — “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Amendments, Article XI — “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

Amendments, Article XIV, Section 1 — “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

The Court has previously had this case in *Milliken v. Bradley*, 418 US 717 (1974), reversing and remanding 484 F2d 215 (CA6, 1973). In that case, the Court answered in the negative the question of “whether a federal court may impose a multi district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding

that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in the public school, [and] absent any finding that the included districts committed acts which effected segregation within the other districts . . .” 418 US at 721.

In that opinion the Court defined the constitutional right of the plaintiffs as follows:

“The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district.” 418 US at 746

The Court concluded its opinion by saying:

“Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to *eliminating the segregation found to exist in Detroit city schools . . .*” (Emphasis supplied) 418 US at 753

The segregation found to exist was the separation of pupils on the basis of race in the Detroit city schools. See, e.g., 418 US at 725-728.

Upon receipt of the Court's mandate from the Court of Appeals, the District Court² ordered the plaintiffs and the Detroit Board to submit desegregation plans and ordered the State Board to submit a critique of the Detroit Board's

²

Honorable Robert E. DeMascio to whom the case was assigned after the death of Honorable Stephen J. Roth on July 11, 1974 (155a).

plan.³ (13a). The plan submitted by the Detroit Board was characterized by the District Court as follows:

"The plan . . . contained many components that were vague or poorly documented. Costs for these components, including transportation, were excessive. The defendant Detroit Board sought to add 3,416 new employees, many at salaries well in excess of those paid to its more experienced and tenured teachers. Moreover, the plan failed to inform the Court of the extent to which each of the components might presently exist in the school system . . ." (13a).

The District Court characterized the plaintiffs' desegregation plan as follows:

" . . . The plan . . . deals solely with pupil reassignment. The rationale and the ultimate goal of the plan are that, as far as possible, every school within the district must reflect the racial ratio of the school district as a whole within the limits of 15 percentage points in either direction . . ." (Emphasis supplied) (24a).

Plaintiffs' plan was consistent, at least, with the theory of their complaint.⁴ As the Court noted in *Milliken v Bradley*, *supra*, 418 US at 723:

³ Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al", and individually by the title of their offices, i.e. "Governor", "State Board", etc; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board."

⁴ Although plaintiffs have filed with the District Court amended complaints alleging claims for multi-district relief, see *Bradley v Milliken*, 411 F Supp 973 (ED Mich, 1975), the original prayer for Detroit-only relief has never been amended. The Court's comment in *Milliken v Bradley*, *supra*, 418 US at 752 n 24, is particularly appropriate, viz: "Apparently, when the District Court, *sua sponte*, abruptly altered the theory of the case . . . , neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory."

" . . . The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate 'the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary, nonracial school system.' "

Hearings on the desegregation plans commenced on April 29, 1975 and concluded with the final arguments of counsel on June 26-27, 1975. During the course of the hearings, on motion of the plaintiffs, the District Court, on May 21, 1975, entered an order requiring Milliken, et al, at their cost, no later than May 28, 1975, to acquire 150 school buses "to be used in the Detroit Desegregation Plan to be implemented by order of the Court." (1a). On the appeal of Milliken, et al, the Court of Appeals modified the District Court's Order by requiring that the acquisition be made by the Detroit Board and that Milliken, et al, pay or reimburse the cost of acquisition to the extent of 75%.⁵ (5a). The Detroit Board's petition for a writ of certiorari to review the Court of Appeal's Order was denied. 423 US 930 (1975).

On August 15, 1975, the District Court filed its Memorandum Opinion and Remedial Decree (7a), and its Partial Judgment and Order (89a). With respect to pupil

⁵ In that opinion, the Court of Appeals stated that the "modification is based upon the representations . . . made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan." (4a). As the Court recognized in *Milliken v Bradley*, 418 US at 742 n 20, the plenary power to acquire transportation and to transport under Michigan law is vested in the local school district, i.e., the Detroit Board. Under the provisions of the state school aid act, 1972 PA 258, § 71, as amended by 1975 PA 261; MCLA 388.1171; MSA 15.1919(571), local school districts are reimbursed from legislative appropriations in an amount not to exceed 75% of the actual cost of transportation, including the acquisition cost of the motor vehicle.

reassignment, the District Court rejected the plans submitted by plaintiffs and the Detroit Board, and ordered the Detroit Board and its staff "in cooperation with the court's appointed experts" to prepare a revised desegregation plan, "which plan shall incorporate the guidelines contained in Section V 'Remedial Guidelines' of the court's Memorandum Opinion." (89a).

Although expressly noting that the plan submitted by the Detroit Board did not distinguish between those components that were necessary to the successful implementation of a desegregation plan and those that were not (35a), nevertheless, the District Court deemed it essential to mandate twelve of the thirteen components included in the Detroit Board's plan and added one of its own, comprehensive reading. (36a-37a, 72a-83a).

Notwithstanding the affirmative holding that the Detroit schools were not *de jure* segregated with respect to faculty and staff, *Bradley v Milliken*, 338 F Supp 582, 589-591 (1971) (Roth, J.), *aff'd* 484 F2d 515 (CA 6, 1973), the District Court in effect reserved its ruling on faculty reassignment, opining as to "the necessity of having a proper racial mix among teaching staff of the school district." (43a). By Order dated August 28, 1975, the District Court directed that "teachers in the Detroit School System shall be reassigned insofar as necessary . . . to achieve a distribution of not more than 70% of teachers of one race in each school." (180a-181a). The Court of Appeals vacated the August 28, 1975 Order and remanded for the hearing of evidence on the issue of faculty assignment, but it affirmed the authority of the District Court "as an equitable remedy to order the reassignment of faculty." (182a).

The District Court's Partial Judgment and Order of August 15, 1975 (89a), was a parallel to its Memorandum Opinion and Remedial Decree. Insofar as it relates to this

petition, the Partial Judgment and Order directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (95a), and directed the Detroit Board to institute comprehensive programs for inservice training, counseling and career guidance, testing, (95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (92a).

Pursuant to the Partial Judgment and Order, the Detroit Board submitted a revised desegregation plan on September 19, 1975, and a revision thereof on October 21, 1975. (104a). By a Memorandum and Order dated November 4, 1975, the District Court ordered the Detroit Board to implement the desegregation plan on or before the beginning of the winter semester, 1976. (109a). By a Judgment entered on November 20, 1975, the District Court, *inter alia*, confirmed the November 4, 1975, Memorandum and Order. (113a).

In broad outline, the plan adopted by the District Court required the reassignment of 27,524 students, of whom 21,853 would require bus transportation. The plan changed the racial balance in 105 schools out of approximately 300 zoned schools in the system (161a). An additional 100 buses were ordered to be acquired and paid for on the same basis as the initial 150 buses. (1d). The desegregation plan was effectuated by the Detroit Board at the beginning of the second semester, January, 1976, without untoward incident. (162a).

While the plan for school desegregation was processed the parties responded in compliance with the Partial Judgment and Order of August 15, 1975, by filing the requisite submissions with respect to those educational components that are the subject matter of this petition for review, to wit: reading and communication skills, in-service training,

testing, and counseling and career guidance. ⁶ At various times, the District Court entered orders approving the submissions and ordering their implementation.

On May 11, 1976, while appeals were pending in the Court of Appeals by plaintiffs, the Detroit Board and the intervenor Detroit Federation of Teachers from the August 14, 1975, Partial Judgment and Order and other Orders subsequently entered based on the August 15, 1975 Memorandum Opinion (7a), the District Court filed a Memorandum, Order, and Judgment (115a) and entered "our final Judgment in this matter." (145a). Insofar as it relates to this petition, the Judgment ordered into effect in the Detroit school system on or before the September, 1976 school term expanded "comprehensive programs for: a) Reading and Communications Skills, b) In-Service Training, c) Testing, [and] d) Counseling and Career Guidance", and ordered petitioners Milliken, et al, to defray one-half the additional cost thereof by the payment to the Detroit Board of additional, unappropriated funds from the State Treasury. ⁷ (146a-147a).

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The reading and communication skills, in-service training and counseling and career guidance submissions were filed by the Detroit Board. The testing submission was a joint effort by the Detroit Board and the State Board. No hearings were held with respect to any of these submissions, or their implementation, except that the District Court conferred with counsel and other representatives of the parties on March 12, 1976. No stenographic record was made of that conference.

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Although this petition is concerned solely with these four so-called educational components, a fifth "component", vocational education centers, requires some explanation because of the District Court's reference thereto in the Memorandum, Order and Judgment of May 11, 1976. (117a-119a). The District Court attempted to equate the vocational education centers with the four components. There is no relationship. For a number of years, the State Board has urged the Detroit Board to establish vocational education centers. The federal vocational education funds that the State Board agreed by its adopted motion and by stipulation

Pursuant to the Judgment (146a-147a), the Detroit Board submitted to the State Board "it's highest budget allocated in any year for each of the above-enumerated quality education components" and computed "the excess cost in addition thereto occasioned by the specific implementation of the [four] court-ordered programs." The highest budget allocated for each of the four components was in the 1975-76 school year and in that year the Detroit Board's budget allocations were as follows:

Reading	\$63,427,000
In-Service	715,000
Testing	1,440,000
Counseling	<u>10,407,000</u>
Total	\$75,989,000

to allocate to the Detroit Board were the funds available to the State Board for allocation on a 50% matching basis to school districts under state and federal law and the state plan for vocational education. See the Vocational Education Act of 1963; 77 Stat 403 *et seq.*, as amended; 20 USC 1241 *et seq.* These funds would have been available to the Detroit Board if it had gone forward with a plan for vocational education centers and had made application therefor. The Detroit Board had received substantial amounts of federal vocational education construction funds in the past when it had made application therefor.

The stipulation, paragraph 3 (140a), expressly recites that state and federal statutes, rules and regulations will control the implementation of the Boards' adopted motions and that title to the centers, paragraph 5 (140a), will be vested in the Detroit Board. In short, the vocational education centers are the antithesis of the four components. The establishment of the centers, pursuant to the stipulation is consistent with state laws, the plenary power of the Detroit Board and the deeply rooted tradition in public education of local control over the operation of schools. See *Milliken v Bradley, supra*, 418 US at 742-743. The cost of the centers is not being defrayed by additional, unappropriated state funds, but from federal funds allocable to the Detroit Board pursuant to law. And the establishment of the centers is an *educational* objective which the State Board, over many years, has urged the Detroit Board to undertake.

The "excess cost in addition thereto" was set forth as follows:

Reading	\$ 4,600,000
In-Service	2,454,000
Testing	539,000
Counseling	<u>4,052,000</u>
Total	\$11,645,000

Thus, the District Court ordered Milliken, et al, to pay to the Detroit Board unappropriated state funds in the amount of 5.8 million dollars in addition to the estimated 192.5 million dollars of appropriated funds (an increase of approximately 28.5 million dollars over 1975-76) that the Detroit Board will receive in state school aid in the 1976-77 school year. 1972 PA 258, as amended by 1976 PA 258; MCLA 388.1101 *et seq*; MSA 15.1919 (501) *et seq*. The purpose of the payment is to defray one-half the cost of expanding system-wide components currently existing system-wide in the Detroit schools at an admitted expenditure in the amount of 75.9 million dollars. ⁸ Further, the four components were finally ordered to be placed in effect some nine months after the desegregation plan for pupil reassignment had been implemented "in an orderly manner and in a spirit of community cooperation, without substantial disruption or disorder." (162a). Finally, it should be noted that although the desegregation plan "changed the racial balance in 105 schools out of approximately 300 zoned schools" (161a), the District Court's Judgment mandated *district-wide* expansion of the four components. (146a-147a).

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In the 1974-75 school year, the Detroit school district ranked 72nd from the top in educational expenditures (current operating expenditure per pupil) among Michigan's 530 K-12 school districts. In terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average levy of 27.1 mills. The figures for 1975-76 have not yet been compiled.

The Court of Appeals affirmed the District Court's ordering of the expansion of existing, system-wide components (170a-171a), and affirmed "the judgment relating to the costs of the plan, but without prejudice to the *right* of the District Court to require a larger proportionate payment by the *State of Michigan* if found to be required by future developments." (emphasis supplied) (180a). In effect, the Court of Appeals drew a sight draft on the treasury of the State of Michigan and affirmed the "right" of the District Court to fill in the amount.

On motion of Milliken, et al, the Court of Appeals granted a stay of its mandate "to the extent of 15 days from date in order to allow movant to seek a stay from the Supreme Court or a Justice thereof." (Order filed August 20, 1976) On September 1, 1976, Mr. Justice Stewart denied the application of Milliken, et al, for a stay pending the filing of a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

IN THE ABSENCE OF ANY ADJUDICATED CONSTITUTIONAL VIOLATION WITH RESPECT TO EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ORDERING THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS IS BASED UPON AN ERRONEOUS LEGAL STANDARD THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

This Court enunciated the following legal standard in *Milliken v Bradley, supra*, 418 US, at 744:

"The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16 . . ."

In the instant cause, there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system. *Milliken v Bradley*, *supra*, 418 US, at 724-736.

Indeed, during oral argument in the remedial phase of this cause, plaintiffs' counsel stated the following:

". . . The first thing we should say about the components is that under those circumstances do we, nor may this Court accept those components as a substitute for achieving the constitutional remedies required by the constitutional violations. The violations were not with respect to the absence of guidance counsellors, they were not with respect to the absence of certain testing components, they were not with respect in-service training, they were not with respect to the absence of career education, or student rights, or school community relations . . ." (June 26, 1975, Transcript, p 131)

The reply brief filed in the Sixth Circuit by defendant, Detroit Board of Education, the moving party behind the so-called "educational components," states, at p 6, that "it does not necessarily follow that since there has been no specific finding of a constitutional violation in the areas included in the educational components, therefore, these components are automatically excluded from a remedy designed to cure the constitutional violation of segregated schools." Thus, such Board makes no claim of any adjudicated constitutional violation as to the scope or

content of the reading, in-service training, testing or guidance and counseling programs conducted by it in the Detroit school system.

In the brief filed by plaintiffs Bradley, et al, in the Sixth Circuit, at p 5 n 6, the following appears:

"The district court has attached undue significance to ruling on matters *wholly unrelated* to desegregation of students and faculty in schools. See e.g. Memorandum and Order, July 3, 1975 (student code of conduct); Memorandum Opinion and Remedial Decree, August 16, 1975, at 99-119 ('educational components' of desegregation)." (emphasis added)

Thus, it is beyond dispute that there are no constitutional violations with regard to educational programs in the Detroit school system. Further, as accurately stated by plaintiffs, Bradley, et al, on whose behalf the case was brought, the "educational components" are "wholly unrelated" to desegregation of pupils in Detroit's schools.

Nevertheless, the Sixth Circuit sustained the inclusion of the four components here at issue by affirming the trial court's purported finding of fact that the components are needed to remedy past segregation, to successfully desegregate and to help avoid resegregation. (170a). This is the same approach previously used by the lower courts in purporting to make factual findings that the Detroit school system could not be desegregated within Detroit. This Court properly reversed the lower courts on that issue, holding that they had employed an erroneous legal standard in seeking to achieve the racial balance they deemed desirable. *Milliken v Bradley*, *supra*, 418 US, at 739-747, 752-753. So here, the lower courts used an erroneous legal standard in compelling educational program expansions in the absence of any underlying constitutional violation with respect to such educational programs in the Detroit school system.

The Sixth Circuit cites only one case, *Brown v Board of Education*, 347 US 483 (1954), in support of its inclusion of expanded educational programs in the desegregation remedy herein. (168a-172a). However, in *Brown v Board of Education*, 349 US 294, 300-301 (1955), dealing with remedy, there is no suggestion that system wide expansion of educational programs is to be a part of a school desegregation remedy.

Moreover, in the 22 years since *Brown, supra*, there have been hundreds of school desegregation remedies that have satisfied the requirements of the Constitution without the inclusion of so-called "educational components." In fact, the trial court in this cause ruled that "[t]here no longer is a denial of their right to equal protection when there are no schools from which they are excluded." (62a).

As this Court noted in *Brown, supra*, 349 US, at 300, "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." More recently, in *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1, 23 (1971), this Court observed that "[o]ur objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." With regard to the operation of schools, other than pupil reassignment, this Court stated that "normal administrative practice" should suffice. *Swann, supra*, 402 US, at 18-19.

Most recently, in *Pasadena City Board of Education v Spangler*, ___ US ___; 96 S Ct 2697, 2705 (1976), this Court ruled as follows:

"... For having once implemented a racially neutral attendance pattern in order to remedy the perceived

constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

Manifestly, the appropriate remedy for unlawful pupil assignment practices is pupil reassignment rather than court ordered expansion of existing educational programs.

The judicial task is to correct the condition that offends the Constitution. *Swann, supra*, 402 US, at 16. Here, there is no condition that offends the Constitution with respect to the scope and content of educational programs in the Detroit school system. Thus, that portion of the unprecedented remedy ordered below dealing with expanded educational programs for in-service training, testing, reading and guidance and counseling is contrary to the decisions of this Court in *Brown, supra*, *Swann, supra*, *Milliken, supra*, and *Spangler, supra*.

The Sixth Circuit's inclusion of expanded educational programs in the remedy here is in conflict with the decision of the Tenth Circuit Court of Appeals in *Keyes v School District No 1, Denver, Colorado*, 521 F2d 465, 480-483 (CA10, 1975), *cert den*, 423 US 1066 (1976). In that case, the Court vacated that portion of the trial court's order compelling the establishment of educational programs tailored to the needs of minority children, noting the lack of relationship between the constitutional violation, discriminatory pupil assignment, and the court ordered relief, establishment of educational programs.

The cases of *Hart v Community School District of Brooklyn, New York School District No 21*, 383 F Supp 699 (ED NY, 1974), *aff'd*, 512 F2d 37 (CA2, 1975), and *Morgan v Kerrigan*, 530 F2d 401 (CA1, 1976), *cert den*, ___ US ___; 96 S Ct 2648, 2649 (1976), dealt with magnet schools

having special programs to attract students as a part of pupil reassignment. In contrast, here we have the court ordered expansion of existing educational programs on a system wide basis that far exceeds in scope the number of schools involved in pupil reassignment, without any prior finding of a violation in the scope and content of educational programs in the Detroit school system.

The question of whether to expand existing educational programs in the Detroit school system is reposed in the sound discretion of the Detroit Board of Education, consistent with its available financial resources. *Milliken v Bradley*, *supra* 418 US, at 742 n 20. Moreover, this Court has held that there is no constitutional right to any particular level of educational programming and funding of same in the public schools, noting that there is no consensus in this area that more is always better. *San Antonio Independent School District v Rodriguez*, 411 US 1, 43 (1973). Proposed changes in public education are important matters to be debated and acted upon by concerned citizens, parents, school official and elected representatives in the democratic political processes rather than by the federal courts.

In summary, the unprecedented inclusion of expanded system wide educational programs in the remedial orders below, unsupported by any constitutional violation as to existing educational programs, is contrary to the decisions of this Court and other courts of appeals. Thus, this Court should grant the petition for a writ of certiorari to review the decision below.

II.

IN THE ABSENCE OF ANY FINDING OF A CONSTITUTIONAL VIOLATION WITH RESPECT TO MICHIGAN'S SYSTEM OF FINANCING PUBLIC EDUCATION, THE LOWER COURT'S UNPRECEDENTED DECISION COMPELLING DEFENDANTS IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PAY OUT 5.8 MILLION DOLLARS OR MORE IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY IS CONTRARY TO THE CONSTITUTION AND THE DECISIONS OF THIS COURT.

Assuming, *arguendo*, that the lower courts did not exceed their remedial authority in ordering the expansion of existing educational programs, the question still remains whether the lower courts may, consistent with the Constitution and the decisions of this Court, compel defendants in the executive branch of state government to pay out 5.8 million dollars or more in additional, unappropriated funds from the State Treasury to defray the cost of such court ordered program expansion. It is one thing for the courts to become the arbiters of curriculum in school desegregation cases within the limits of appropriated local and state funds. It is another matter for the courts to also usurp the powers of state legislatures over appropriating state funds in school desegregation cases.

Again, at the threshold we are confronted with the reality that there has been no adjudication herein that the Michigan system of financing public education violates the Constitution under this Court's controlling decision in *Rodriguez*, *supra*. *Milliken v Bradley*, *supra*, 418 US, at 751-752. ⁹ Thus,

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During the remedy hearings below, plaintiffs' counsel stated "... This, I repeat, is a desegregation case. It is not a school finance case ..." (June 26, 1975, Transcript, p 8).

there is no adjudicated violation in this case in the areas of educational programs or school finance that might justify the unprecedented financial relief ordered below against the State of Michigan and its treasury. (180a).

The Sixth Circuit decision below cites no case law in which the federal courts have ordered officials in the executive branch of state government to pay out additional, unappropriated funds from the State Treasury for the cost of court ordered educational program expansion.¹⁰ (172a-180a). This unprecedented expansion of the power of the federal courts over the states, their treasuries and the right of the people in each state to have their state tax dollars appropriated by their elected representatives should not come to pass without prior review by this Court.

Recently, this Court held, in *National League of Cities v Usery*, US ____; 96 S Ct 2465 (1976), that the power of the Congress under the Commerce Clause did not, because of the Tenth Amendment, extend to imposing minimum

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By way of illustrative example, the Court of Appeals cites *Scheuer v Rhodes*, 416 US 232, 238 (1974), a case in which this Court held that the Eleventh Amendment was not a bar to a civil action against state officers for money damages to be paid by the individual defendants rather than from the State Treasury. The Sixth Circuit also referred to *Cooper v Aaron*, 358 US 1 (1958), which involved the blatant disregard by state officers of a Supreme Court decision, a situation which has no relevance to the position of *Milliken, et al.* No court order has been, or will be, disobeyed. Moreover, *Cooper, supra*, did not in any way consider the power of a federal court to order payment of state funds in light of the Eleventh Amendment. The Court of Appeals relied heavily on *Wyatt v Aderholt*, 503 F2d 1305, 1318-1319 (CA5, 1974). However, a reading of that case reveals that no coercive relief was granted compelling the payment of funds from the State Treasury. In *Wright v Houston Independent School District*, 393 F Supp 1149, 1155 (SD Tex, 1975), the basic question was whether the local school district could be considered a state agency for Eleventh Amendment purposes.

wage requirements on the states and their political subdivisions. In reaching that result, this Court noted the financial impact of such requirement on state governments and concluded its opinion with the following:

“But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress’ power to regulate commerce. We think the dicta from *United States v. California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow ‘the National Government [to] devour the essentials of state sovereignty,’ 392 U.S., at 205, 88 S. Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled.”

— US ____; 96 S Ct, at 2475-2476

So here, the Tenth Amendment is also a limitation on the power of the federal courts to force their choices upon the states as to the conduct of integral governmental functions, including the appropriation of finite state tax dollars among competing demands from all levels of public education and the myriad of other governmental programs and services financed with state legislative appropriations. *Bradley v School Board of Richmond, Virginia*, 462 F2d 1058, 1068

(CA 4, 1972) aff'd by equally divided court, 412 US 92 (1973). *National League of Cities v Usery, supra*.

In *Griffin v County School Board of Prince Edward County*, 377 US 218, 233 (1964), this Court ruled that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Thus, there this Court directed local officials to exercise their lawful powers under state law to levy local taxes to reopen the public schools free from racial discrimination.

Here, in contrast, the lower courts have ordered petitioners Milliken, et al, to pay out additional, unappropriated funds from the State Treasury for court ordered program expansions in contravention of their lawful powers under state law. Under Michigan law, only the legislature may appropriate state funds. Mich Const 1963, art 9, § 17; ¹¹ *Regents of University of Michigan v Labor Mediation Board*, 18 Mich App 485, 490; 171 NW2d 477, 479 (1969).

In *Edelman v Jordan*, 415 US 651 (1974), this Court held that the Eleventh Amendment precluded the federal courts from ordering the payment of welfare benefits from the State Treasury even though such benefits had been wrongfully withheld. In reaching that result, the Court noted, at p 667 n 12, that *Griffin, supra*, involved an order directed to county officials that did not fall within the ambit of the Eleventh Amendment's jurisdictional bar.

¹¹

"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

In this case, the decree sought to be reviewed does not direct state officials to alter their previous course of conduct, in compliance with a substantive federal-question determination concerning pupil assignment in the Detroit schools, with an ancillary effect on the State Treasury. Rather, the decree sought to be reviewed directly commands "the State of Michigan" to pay out millions of dollars in additional, unappropriated state funds for court ordered program expansion, to remedy the claimed effects of its alleged prior wrongdoing with regard to pupil assignment. (180a). It is, in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials. Therefore, such decree is precluded under this Court's holding in *Edelman v Jordan, supra*, 415 US, at 668.

The order below has a most detrimental effect on the fiscal integrity of the State of Michigan. At the close of the 1974-1975 fiscal year, June 30, 1975, the balance in the State of Michigan's general fund was only 1.6 million dollars. The 1975-1976 state fiscal year has been extended to September 30, 1976, in an attempt to balance the state's budget for the fiscal period as required by Mich Const 1963, art 5, § 20. ¹² The most recent estimate provided the Michigan legislature by the Michigan Budget Director is that, as of September 30, 1976, the state's general fund will have a deficit of 1.9 million dollars. The decision below will superimpose upon this

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"No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes."

strained fiscal situation the added obligation to pay out an additional 5.8 million dollars or more, thereby increasing the likelihood that the State of Michigan will have a substantial deficit for the extended 1975-1976 fiscal year. This result, we submit, is what the Eleventh Amendment was intended to preclude.

In the 1974-75 fiscal year, the Detroit school system, with a current operating expenditure per pupil of \$1,271.40, ranked 72nd from the top among Michigan's 530 K-12 school districts. Recent data submitted to the Michigan Department of Education by the Detroit Board of Education on August 20, 1976, reveals that, at the close of the 1975-1976 school fiscal year, the Detroit Board of Education had a general fund equity surplus of 5 million dollars to carry forward into the 1976-1977 school fiscal year with projected total resources of approximately 393 million dollars for such school fiscal year. Thus, it is readily apparent that, contrary to the self-serving portrayal of economic deprivation submitted below by the Detroit Board of Education and adopted by the Sixth Circuit, the Detroit school system has been financially sound in recent years even though it has not made even an average local tax effort for school operating purposes.

Although the Detroit school system finished the 1975-1976 school fiscal year on June 30, 1976, with a general fund surplus of approximately 5 million dollars, the Detroit Board of Education has estimated that it will not be able to maintain existing program levels for the 1976-1977 school fiscal year. This financial problem, to the extent it exists, is directly attributable to the unwillingness of the voters to approve an increase in the property tax rate limitation for school operating purposes in the Detroit school system.

Michigan's system of financing public education includes both local property tax revenues and legislative appropriations of state school aid funds to school districts. Mich Const 1963, art 9, §§ 6 and 11. Michigan has adopted a modified district power equalizing system of school finance which encourages and rewards local tax effort by guaranteeing a fixed level of funding per pupil in combined state and local funds for each mill of school operating property taxes levied at the local level.

Pursuant to recent statutory amendments to the state school aid act, the Detroit school system will receive approximately 192.5 million dollars in legislatively appropriated funds for the 1976-1977 school fiscal year, an increase of approximately 28.5 million dollars over its 1975-1976 state school aid funding. 1972 PA 258, as last amended by 1976 PA 258; MCLA 388.1101 *et seq*; MSA 15.1919(501) *et seq*. Thus, this is not a case in which appropriations have been reduced to interfere with desegregation.¹³

The current property tax rate for school operating purposes in the Detroit school system is below the state wide average for Michigan's school districts. On August 3, 1976, the voters in the Detroit school system failed to approve a tax rate increase for school operating purposes. The Detroit Board of Education will hold another millage election in November, 1976, and, in the event the millage increase is approved, may levy the increase and receive the additional revenue for the 1976-1977 school fiscal year.

¹³

The reference below to "the normal share of State school aid funds provided to Detroit" (178a) is misplaced. There is no normal share of state aid funds provided Detroit, but only the amount each year which the Detroit school system is entitled to receive based upon the statutory appropriation and allocation formulas enacted by the legislature in 1972 PA 258, as amended, *supra*. Further, at what point, if ever, will the Michigan legislature have appropriated sufficient funds to the Detroit school system to satisfy the lower courts so that additional, unappropriated funds will not have to be disbursed to such school system?

The 5 mill increase in school operating property taxes in the Detroit school system, if approved, would generate an additional 37 million dollars in combined local property tax revenues and state school aid funds, including an additional 12 million dollars in state school aid funds by operation of law under the statutory allocation formulas enacted by the legislature to encourage and reward local tax effort. This 12 million would be in addition to the 192.5 million in state school aid funds referred to above for the 1976-1977 school fiscal year.

In *Rodriguez, supra*, 411 US, at 40-44, 49-55, this Court sustained the validity of the Texas system of financing public education, ruling that matters of state fiscal and educational policy are best determined at the state or local level under our federal system. There, this Court held that reliance on variable local school district property taxes for financing public education furthered the legitimate purpose of local control of education consistent with the Equal Protection Clause.

Here, as in *Rodriguez, supra*, we have a system of financing public education based upon a combination of local property tax revenues and legislative appropriations of state school aid. In Michigan the state school aid statute is designed to encourage and reward local tax effort for public education. As long as the prospect of increased state funding for Detroit by federal court order looms large, the voters in Detroit will lack incentive to approve property tax increases for school operating purposes. Further, Michigan's statewide system of financing public education will be disrupted, contrary to the decision of this Court in *Rodriguez, supra*.

In summary, the lower courts have assumed the role of the Michigan legislature in ordering *Milliken, et al*, to disburse millions of dollars in additional, unappropriated funds from

the State Treasury to pay the cost of court ordered educational program expansion in the Detroit school system. This, we submit, is contrary to the decisions of this Court in *National League of Cities v Usery, supra*; *Edelman v Jordan, supra*, and *Rodriguez, supra*.

III.

THE QUESTIONS RAISED HEREIN BY THE UNPRECEDENTED DECISION BELOW ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The unprecedented decision below raises fundamental questions concerning the scope of the remedial powers of the federal courts in school desegregation cases in the areas of expanded educational programming and the financing of same. The decision calls into question the violation-remedy relationship that has been the foundation of this Court's holdings in this area of the law.

In addition, the lower court decision on financing raises important questions under the Tenth and Eleventh Amendments concerning the extent to which the federal courts may take over the legislative role of appropriating and allocating state tax revenues in our federal system. Also, the decision below raises questions with regard to state systems of financing public education and this Court's decision in *Rodriguez, supra*.

From *Brown, supra*, until recently, the federal courts have not assumed the functions of controlling curriculum and regulating educational finance in school desegregation cases. If the federal courts may assume these functions, it should only be after this Court has carefully reviewed the matter

and settled the questions with some definitive guidelines, as was done in *Swann, supra*, with regard to pupil reassignment.

As this Court is aware, school desegregation cases are being litigated all across the United States. Only this Court can establish the uniform national remedial standards that are required for adjudication of these cases in a consistent manner throughout this country.

Previously in this case, the lower courts approved an unprecedented multi-district remedy to "produce the racial balance which they perceived as desirable," thereby compelling reversal by this Court. *Milliken v Bradley, supra*, 418 US, at 740. Under the judgment of the Court of Appeals, to produce the educational results which they perceive as desirable, the lower courts have become the educational and financial arbiters of curriculum and school finance for the Detroit school system and the State of Michigan. As in *Milliken v Bradley, supra*, this Court should grant appellate review of the unprecedented decision below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit rendered herein on August 4, 1976.

Respectfully submitted,

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Dated: September 24, 1976.

SEP 28 1976

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RUDAK, JR., CLERK

October Term, 1976

No. **76-447** 1

WILLIAM G. MILLIKEN, Governor of the State of Michigan; **FRANK J. KELLEY**, Attorney General of the State of Michigan; **MICHIGAN STATE BOARD OF EDUCATION**, a constitutional body corporate; **JOHN W. PORTER**, Superintendent of Public Instruction of the State of Michigan, and **ALLISON GREEN**, Treasurer of the State of Michigan,

Petitioners,

-vs-

RONALD BRADLEY and **RICHARD BRADLEY**, by their Mother and Next Friend, **VERDA BRADLEY**; **JEANNE GOINGS**, by her Mother and Next Friend, **BLANCH GOINGS**; **BEVERLY LOVE**, **JIMMY LOVE** and **DARRELL LOVE**, by their Mother and Next Friend, **CLARISSA LOVE**; **CAMILLE BURDEN**, **PIERRE BURDEN**, **AVA BURDEN**, **MYRA BURDEN**, **MARC BURDEN** and **STEVEN BURDEN**, by their Father and Next Friend, **MARCUS BURDEN**; **KAREN WILLIAMS** and **KRISTY WILLIAMS**, by their Father and Next Friend, **C. WILLIAMS**; **RAY LITT** and **MRS. WILBUR BLAKE**, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and **NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH**; **BOARD OF EDUCATION OF THE CITY OF DETROIT**, a school district of the first class; **DETROIT FEDERATION OF TEACHERS, LOCAL 231**, **AMERICAN FEDERATION OF TEACHERS, AFL-CIO**,

Respondents.

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al.,

Plaintiffs,

v.

WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants

Civil No.
35257

ORDER FOR ACQUISITION OF TRANSPORTATION

Plaintiffs having moved for an order requiring the purchase of transportation equipment, and the court having reviewed the briefs submitted by the parties and having considered the arguments of counsel and being fully advised in the premises;

IT IS, THEREFORE, ORDERED, pursuant to *Bradley v. Milliken*, 484 F.2d 215, 258 (6th Cir. 1973), *rev. on other grounds*, 418 U.S. 717 (1974), that the Order for Acquisition of Transportation entered by this court on July 11, 1972, be and hereby is reinstated but modified as follows:

1. The State Defendants, including added defendant Allison Green, shall acquire by purchase, lease or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than May 28, 1975;

2. The State Defendants shall bear the costs of this

acquisition, and the State Defendants shall take all [2] necessary steps utilizing existing funds already allocated, or to be allocated, and by re-allocating existing or new funds, to pay for such transportation acquisition.

**ROBERT E. DeMASCIO /s/
Robert E. DeMascio
United States District Judge**

Dated: May 21, 1975

[679]

519 F.2d 679 (1975)

Ronald BRADLEY et al.
Plaintiffs-Appellees,

V.

No. 75-1668.

**William J. MILLIKEN, Governor of
Michigan, and Michigan State Board
of Education, et al.**
Defendants-Appellants.

**Board of Education, City of Detroit,
Michigan, et al.**

Defendants.

United States Court of Appeals,
Sixth Circuit.

June 19, 1975.

Certiorari Denied Nov. 3, 1975.
See 96 S.Ct. 280.

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

ORDER

This is an appeal from an order of the United States District Court for the Eastern District of Michigan requiring the State defendants to acquire 150 buses to be used in the Detroit desegregation plan to be implemented by the order of the District Court. The case was submitted on briefs and oral arguments this June 11, 1975.

Upon consideration, this court concludes that the District Judge had no choice, under the decision of the Supreme Court in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), except to order the immediate acquisition of school buses. No party to the proceeding made any representation to the contrary during the course of the hearing in this court.

Likewise, this court has no choice under the just cited decision of the Supreme Court except to affirm the result of the order of the District Court requiring the acquisition of school buses now, as herein modified. This modification is based upon the representations to this court made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan as recited in said representations. Said order is modified to read as follows:

Plaintiffs having moved for an order requiring the purchase of transportation equipment, and the court having reviewed the briefs submitted by the parties and having considered the arguments of counsel and being fully advised in the premises:

It is, therefore, ordered, pursuant to *Bradley v. Milliken*, 484 F.2d 215, 258 (6th Cir. 1973), *rev. on other grounds*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), that the Order for Acquisition [680] of Transportation entered by this court on July 11, 1972, be and hereby is reinstated but modified as follows:

1. The Detroit School Board, defendants, shall acquire by purchase, lease or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than July 3, 1975.

2. The State defendants shall bear the costs of this acquisition to the extent of 75% thereof¹, and the State defendants shall take all necessary steps utilizing existing funds already allocated, or to be allocated and by re-allocating existing or new funds, to pay or reimburse the State's share of such transportation acquisition.

EDWARDS, Circuit Judge (concurring).

I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing. In *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), the Supreme Court overruled this court and the United States District Court in Detroit by reversing a carefully documented finding of fact that racial desegregation in the schools of Detroit could not be accomplished within the boundaries of the Detroit school district where the school population was found to be approximately 64% black, with a predicted 72% black school population by 1975-76 and 80.7% by 1980-81. The decision also imbued school district boundaries in Northern states (which like Michigan, had never had school segregation laws) with a constitutional significance which neither federal nor state law had ever accorded them.

1.

In *Milliken v. Bradley*, 418 U.S. 717, 726, 94 S.Ct. 3112, 3118, 41 L.Ed.2d 1069 (1974), the Supreme Court said:

"The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education. [Footnote omitted.] The State, for example, was found to have failed, until the 1971 Session of the Michigan Legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly white, suburban districts the full range of state-supported transportation."

This court's opinion in *Bradley v. Milliken*, 484 F.2d 215, 217 (6th Cir. 1973), had accepted a finding by the District Judge that a desegregation plan limited to Detroit "would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area." The Supreme Court did not overturn that finding.

The key sentence in the majority opinion of the Supreme Court reads: "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." Presumably this means that if and when the Detroit school district becomes 95% or more black, immediately surrounded by suburban school districts 95% or more white, no problem of federal constitutional significance arises.

Unless the thrust of this sentence is altered by further Supreme Court interpretation or overruling — or by action in the area of racial integration by Congress or the Presidency — it can come to represent a formula for American apartheid.

Since the Supreme Court decision is based in part upon the fact that (like all Northern states) Michigan never had school segregation by state statute, the case creates one law for the North and another for the South.

I know of no decision made by the Supreme Court of the United States [681] since the Dred Scott decision (*Scott v. Sanford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), which is so fraught with disaster for this country.

[1096]

Ronald BRADLEY et al.,
Plaintiffs,**v.**
**William G. MILLIKEN, Governor of
the State of Michigan and Ex-Officio
Member of Michigan State Board of
Education, et al.,**
Defendants.
**Civ. No.
35257.**

United States District Court,
E. D. Michigan, S. D.
Aug. 15, 1975.

[1101]

MEMORANDUM OPINION AND REMEDIAL DECREE

(Findings of Fact and Conclusions of Law)

DeMASCIO, District Judge.

I. INTRODUCTION

Our task in this on-going litigation is to formulate a just, equitable and feasible plan to desegregate the Detroit School System, taking account of the practicalities at hand. We do so in response to a United States Supreme Court mandate that we formulate a "decree directed to eliminating the segregation found to exist in Detroit City Schools." Writing for the majority of the Supreme Court, Chief Justice Burger noted that the district court and court of appeals:

"proceeded on an assumption that the Detroit schools could not be truly desegregated — in their view of what constituted desegregation — unless the racial composition of the student body of each school substantially

reflected the racial composition of the population of the metropolitan area . . .” *Milliken v. Bradley*, 418 U.S. 717, 740, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974).

The Chief Justice then pointed out that *Swann v. Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) “does not require any particular racial balance in each ‘school, grade or classroom.’ . . .” 418 U.S. at 740-41, 94 S.Ct. at 3125. Thus, the Court did not deem it essential to furnish guidelines for desegregating the Detroit School System. Cf. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). Rather, it left this court to determine what constitutes desegregation in this particular school district.

In our analysis, we have been mindful that rigid and inflexible desegregation plans too often neglect to treat school children as individuals, instead treating them as pigmented pawns to be shuffled about and counted solely to achieve an abstraction called “racial mix.” We recognize that our concern is with the very young and that a just, equitable and feasible desegregation plan should not destroy the educational mission of the schools they attend. We are aware of the adverse educational and psychological impact upon black children compelled to attend segregated schools; to separate them from other children solely because of skin pigmentation is [1102] indeed invidious. But although the resulting injury is great, the remedy devised should not inflict sacrifices or penalties upon other innocent children as punishment for the constitutional violations exposed. We must bear in mind that since those committing the grotesque violations are no longer about, any such punishment or sacrifices would fall upon the very young; it is the children for whom the remedy is fashioned who must bear the additional burdens.

The necessity of preserving the educational system for whom this remedy is addressed has compelled us to scrutinize carefully plans that are rigidly structured to

achieve a racial mix, that include pairing and clustering of schools, that fracture grade structures and that include massive transportation. All of these techniques require children to spend more time going to school and divert educational dollars and energy from legitimate educational concerns.

If Detroit’s school population were more equally divided between black and white or if the desegregation area were sufficiently large to permit greater equalization, it would be possible to diminish the inevitable limitations on the task of eliminating racially identifiable schools in the district. But it is impossible to avoid having a substantial number of all black or nearly all black schools in a school district that is over 70% black. The truth of this statement is best demonstrated by the desegregation plan offered by the plaintiffs in this litigation; while plaintiffs contend that their plan affords the greatest degree of desegregation, their plan leaves the majority of the schools in the district between 75% and 90% black. An appropriate desegregation plan must carefully balance the costs of desegregation techniques against the possible results to be achieved. Where the benefits to be gained are negligible, those techniques should be adopted sparingly.

Finally, an effective and feasible remedy must prevent resegregation at all costs. To ignore the possibility of resegregation would risk further injury to Detroit school children, both black and white. In a school district that is only 26% white, a remedy that does not take account of the possibility of resegregation will be short-lived and useless if that percentage of whites further decreased. A realistic desegregation plan should recognize that abuses such as optional attendance zones, gerrymandered attendance zones, discriminatory assignments, the bussing of black children away from closer white schools and school construction that knowingly tends to have segregative effects are unlikely to recur in a school system that has a majority black board of education and a bi-racial administrative staff.

The guidelines adopted by this court consider the "practicalities of the situation", and at the same time make "every effort to achieve the greatest possible degree of actual desegregation" *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971). The "practicalities" that an appropriate remedy should consider encompass the legitimate concerns of the school system and the community at large. One legitimate concern deserving of weight is the undesirability of forced reassignment of students achieving only negligible desegregative results. Another of the practicalities is the shifting demography occurring naturally in the school district together with the persistent increase in black student enrollment. Still another of the practicalities to be taken into account is the racial population of the district, which is predominantly black by a wide margin. Further practicalities that must be considered by this court include the declining tax base of the City of Detroit, the depressed economy of the city, and the volatile atmosphere created by the highest rate of unemployment in the nation. Finally, the decree must consider the overriding community concern for the quality of educational services available in the school district. An effective and flexible remedy must contain safeguards that will enhance rather [1103] than destroy the quality of the educational services provided in the City of Detroit.

[1103]

II. PRIOR PROCEEDINGS

The Detroit School Desegregation case has been in litigation for nearly five years. The plaintiffs filed this action on August 18, 1970, naming as defendants the Detroit Board of Education, its members and the Detroit Superintendent of Schools, together with the Governor, Attorney General, State Board of Education and the State Superintendent of Public Instruction for the State of Michigan. The complaint alleged *inter alia* that as a result of actions and inactions on the part of all the named defendants, the Detroit Public School System was racially segregated. The complaint further challenged the constitutionality of Act 48 of the Michigan Public Acts of 1970 insofar as that Act precluded implementation of the April 7, 1970, "plan"

to desegregate the Detroit Public Schools. The plaintiffs further prayed for a preliminary injunction to restrain the enforcement of Act 48 together with an order requiring the Detroit Board of Education to implement the so-called April 7, 1970, desegregation plan.

The district court ruled that plaintiffs were not entitled to preliminary injunctive relief and declined to rule on the constitutionality of Act 48. At that time the district court granted a motion dismissing the action as to the Governor and the Attorney General. (Rulings dated September 3, 1970.) Upon appeal, the United States Court of Appeals for the Sixth Circuit sustained the district court's denial of plaintiffs' motion for a preliminary injunction but reversed the district court in part, holding that portions of Act 48 were unconstitutional and at the same time ordering that the Governor and the Attorney General remain as parties to the litigation. *Bradley v. Milliken*, 433 F.2d 897 (6th Cir. 1970). Although the defendant Detroit Board of Education would have implemented the so-called April 7 desegregation plan upon order of the court or otherwise, the district court did not order implementation of such "plan"; instead as an interim plan, it adopted a plan submitted by the Detroit Board known as the "Magnet Plan." (December 3, 1970, Ruling on School Plans.)

Following a trial on the liability issue, the district court found that the Detroit School District was segregated on the basis of race. The court found that certain conduct on the part of the defendant Detroit Board of Education and the defendant State of Michigan, through its various state officials, fostered segregation in the Detroit Public School System and violated the Fourteenth Amendment rights of Detroit school children. The district court also held that the state was vicariously liable for certain *de jure* acts of the defendant Detroit Board of Education. The district court specifically found that the state failed until 1971 to provide funds for the transportation of pupils within the Detroit School System regardless of their poverty or distance from the school to which they were assigned, although at the same time the state provided financial assistance for student transportation to many neighboring, mostly white suburban districts. The district court finally found that the state,

through Act 48, acted to "impede, delay and minimize racial integration in Detroit schools." 338 F.Supp. 582 at 589.

The district court thereafter ordered the parties to submit plans to desegregate the Detroit Public Schools. Pursuant to this order the defendant Detroit Board of Education submitted two plans, referred to as Plan A and Plan C, that were restricted to the corporate limits of the City of Detroit. At the same time the plaintiffs filed a desegregation plan known as the "Foster Plan" and the State defendants filed a "Metropolitan School District Reorganization Plan." Following the hearings conducted on the Detroit-only plan, the district court concluded that the Detroit Board of Education Plans A and C were legally insufficient because they would not significantly [1104] desegregate the school system: The court found that Plan A was an elaboration and extension of the Magnet Plan then in effect and further found that Plan C as submitted by the Detroit Board was merely a token desegregation effort. The district court also rejected the plan submitted by plaintiffs, specifically finding that plaintiffs' plan would entail a re-casting of the entire Detroit School System and would leave the majority of its schools 75 to 95% black, thus making the Detroit School System more identifiably black. The district court then concluded as a matter of law that "under the evidence in this case [it] is inescapable that relief of segregation in the public schools in the City of Detroit cannot be accomplished within the corporate geographical limits of the city." The Court of Appeals for the Sixth Circuit affirmed the district court's ruling on the issue of segregation and its Findings of Fact and Conclusions of Law on the Detroit-only plan. The court further affirmed in principle the propriety of a metropolitan remedy. Following a grant of *certiorari* to the Court of Appeals, the Supreme Court, on July 25, 1974, affirmed the district court's finding on the liability issue of segregation and did not disturb the court's finding that the Detroit Public Schools could not be adequately desegregated within the corporate limits of the city but reversed the court's approval of a metropolitan remedy, holding that a district court may not impose a multi-district remedy to correct a single school district's acts of *de jure* segregation.

On January 13, 1975, upon receipt of the Supreme Court mandate from the Court of Appeals, this court filed an order requiring the parties to file a current status report. This order precipitated the filing of numerous motions to dismiss by the intervening suburban defendants. Following a pre-trial conference on February 18, 1975, the defendant Detroit Board and the plaintiffs were ordered to submit desegregation plans for Detroit only, on or before April 1, 1975. The State defendants were ordered to submit a critique of the Detroit Board plan by April 20, 1975. On April 16, 1975, the court granted the motions to dismiss filed by the intervening suburban defendants and simultaneously granted plaintiffs' motion to amend their complaint to include allegations of inter-district *de jure* violations.

The plan submitted by the Detroit Board contained many components that were vague or poorly documented. Costs for these components, including transportation, were excessive. The defendant Detroit Board sought to add 3,416 new employees, many at salaries well in excess of those paid to its more experienced and tenured teachers. Moreover, the plan failed to inform the court of the extent to which each of the components might presently exist in the school system. When these deficiencies became apparent, the court deemed it advisable to appoint three court experts and commissioned them as officers of the court to obtain much of the needed information. The court assigned its experts to obtain from the Detroit Board sufficient data to evaluate the components included in the plan. Because the constitutional sufficiency of the defendant Board's plan could be determined only by examining all of the alternatives, the court deemed it necessary to request its experts to explore additional possibilities to aid the court's evaluation of the transportation component. The hearings on both plans commenced on April 29, 1975.

We now detail the findings of fact in order to determine the amount of desegregation possible in this school district, giving due consideration to the practicalities at hand. We are reminded that, according to *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1954), this court is to be guided by equitable principles. Thus, its guidelines must be flexible and responsive to public and private needs.

III. FINDINGS OF FACT

A. *The Detroit School System*

1. The Detroit School System, which is coterminous with the City of Detroit, [1105] is governed by a Central Board of Education. In an attempt to decentralize this huge school system the Michigan legislature, pursuant to Act 48 of the Michigan Public Acts of 1970 (Mich. Comp. Laws 338.171 *et seq.*) divided the school system into eight geographic "regions". Each region is governed by a regional board of education whose primary responsibilities and relationship with the central Board of Education are outlined in Defendant Board of Education's Exhibit 4, "Guidelines for Decentralization". Each region has a five-member board elected by the citizens residing within its boundaries. The individual board member receiving the highest number of votes is designated chairman of the regional board.

The Central Board of Education consists of 13 members. Five of its members are elected from the City of Detroit at large and the remaining positions are occupied by the eight regional chairmen. The day-to-day administration of the entire school system is the responsibility of a General Superintendent of Schools, an Executive Deputy Superintendent, a Deputy Superintendent and an Assistant Superintendent, together with eight Regional Superintendents selected by the regional boards. The "Guidelines for Decentralization" indicate that there is much autonomy left with the regional boards. For example, the regional boards retain the authority to change attendance boundaries within their regions, transfer teachers from school to school within their regions, vary the educational curriculum in schools within their regions and hire the Regional Superintendents. Under the regional system the quality of education could vary not only among regions but also among schools within a region. Notwithstanding this decentralized system, the Central Board of Education remains responsible for governing the entire system and for overseeing the actions of the regional boards.

2. Both the Central Board and the central administrative staff under the supervision of the General Superintendent are bi-racial in character. Nine of the Central Board's thirteen members, including the Board President, are black; the other four members are white. At the beginning of this remedial hearing the General Superintendent was white and the Executive Deputy Superintendent was black; when these proceedings were completed the white General Superintendent had retired and had been replaced by one who is black. The bi-racial aspects of the school administration extend throughout the entire staff, down to the level of the department heads.

The racial composition of the school administration has changed dramatically since the inception of this lawsuit in 1970. At the conclusion of the trial on the liability aspects of this litigation in 1971, the Central Board was composed of ten white members and three black members and the greater part of the General Superintendent's staff was white. As a result of the decentralization brought about by the passage of Act 48, the black community has become more involved in and has experienced greater control over the Detroit School System.

3. Although the Supreme Court decision in this case was handed down in July of 1974, the Detroit Board of Education did not take steps to formulate a desegregation plan until ordered to do so by this court. In January of 1975, however, they created a desegregation office commissioned to formulate an acceptable plan. The Detroit Board's plan, submitted to this Court on April 1, 1975, was adopted by a 9-4 vote. The nine black members of the Board voted in favor of the desegregation plan while the four white members opposed the plan as presented. Although this vote was split along racial lines, the central Board of Education is nevertheless a cooperative Board and is willing to desegregate the Detroit school system. However, the plan as submitted does not enjoy unanimous acceptance among the members of the Detroit Board, the members of the administrative staff or the members of the desegregation office. It is apparent that under the regional system it is possible [1106] that the degree of desegregation under the Board's plan could vary among different regions and it is likely that the

plan as submitted by the Central Board of Education enjoys varying degrees of acceptance in different regions.

B. Statistical and Demographic Data

4. The most recent official racial-ethnic distribution count, taken on September 27, 1974, discloses that there are 257,396 students enrolled in the Detroit Public Schools. Of this number 71.5% are black and 26.4% are white, while 2.1% is comprised of other ethnic groups. In the Detroit School System's regular K-12 program 247,113 students are enrolled, of which 71.4% are black and 28.6% is comprised of white and other ethnic groups. In the elementary schools, grades K-6, 141,806 students are enrolled, of which 72.3% are black and 27.7% is comprised of white and other ethnic groups. In the junior high schools, grades 7-8, 39,600 students are enrolled of which 73.0% are black and 27.0% is comprised of white and other ethnic groups. In the senior high schools, grades 9-12, 65,707 students are enrolled, of which 68.6% are black and 31.4% is comprised of white and other ethnic groups. (See Defendant Board of Education's Exhibit 6, page 4.) The racial composition of each region as of September 27, 1974, is reflected in the table next attached:

ETHNIC COMPOSITION BY REGION

Region	Total Student Membership	Racial-Ethnic Distribution									
		American Indian		Asian American		Black American		Spanish Surnamed		White and Others	
		Num-ber	Per-cent	Num-ber	Per-cent	Num-ber	Per-cent	Num-ber	Per-cent	Num-ber	Per-cent
1	24907	70	0.3	68	0.3	22486	90.3	234	0.9	2049	8.2
2	36972	121	0.3	93	0.3	22278	60.3	3450	9.3	11030	29.8
3	33723	22	0.1	50	0.1	23876	70.8	220	0.7	9555	28.3
4	36820	40	0.1	181	0.5	20414	55.4	145	0.4	16040	43.6
5	31354	7	0.0	16	0.1	30325	96.7	17	0.1	989	3.1
6	30796	37	0.1	48	0.2	19442	63.1	130	0.4	11139	36.2
7	24605	16	0.1	140	0.6	11114	45.2	88	0.3	13247	53.8
8	29725	4	0.0	26	0.1	28300	95.2	66	0.2	1329	4.5
City-Wide Schools	8494	15	0.1	34	0.4	5883	69.3	107	1.3	2455	28.9
Total District	257396	332	0.1	656	0.3	184118	71.5	4457	1.7	67833	26.4

5. This court previously found that the population of the City of Detroit peaked in 1950 and since that year has been declining steadily at the rate of approximately 169,500 per decade. In 1950 Detroit's population constituted 61% of the total population of the standard metropolitan area; in 1970 it comprised but 36% of that figure. The black population in the City of Detroit has increased markedly from 1.4% of the city population in 1900 to 43.9% in 1970. 338 F.Supp.582 at 585-86. The Detroit Board of Education's demographic expert testified, and we agree, that a current study of Detroit population trends indicates that as of 1975 the population of the City of Detroit is majority black.

6. On September 27, 1971 this court found that the decline in the percentage of white students in the Detroit Public School system during the period 1961-1970 was greater than the percentage decline of the overall white population in the city. At the same time the percentage of black enrollment in the Detroit school system increased at a greater rate than the overall general black population in the city during the same period. In the 1960-1961 school year there were [1107] 285,512 students in the Detroit school system, of which 130,765 (45.8%) were black. In the 1966-1967 school year there were 297,035 students in the system, of which 168,299 (56.7%) were black. In the 1970-1971 school year 289,743 students were enrolled, of which 184,194 (63.6%) were black. During the period between 1968 and 1970 the Detroit school system experienced a larger increase in the percentage of black students than any other major northern school district. The percentage increase in Detroit during that period was 4.7% as contrasted with a high of 3.2% in Boston and a low of 1.1% in Denver among other major northern school districts. (338 F.Supp. 582 at 586.) This court predicted in 1971 that, if present trends continued, the percentage of black students in the Detroit Public Schools would be 72% in the 1975-1976 school year, 80.7% in the 1980-1981 school year and, further, the system would be virtually 100% black by 1992. (338 F.Supp. at 585.) The record compiled during this remedial proceeding demonstrates that the predictions made by the

District Court in 1971 were totally accurate, if not somewhat conservative.¹ During the past five years the black student enrollment has increased at an average of 2% per year, with a corresponding 2% decrease in the white student population during the same five-year period. At the elementary level the school system is presently 72.5% black and the trend toward a 2% annual increase has been positively identified.

7. There are presently 326 schools in the Detroit Public School System: 226 elementary schools, 56 junior high schools, 22 high schools and 22 specialized and primary schools. The system operates on a feeder plan, in which elementary students are assigned to specific junior and senior high schools. The geographic distribution of these schools, which are distributed throughout the city, reflects the Detroit School System's devotion to the neighborhood school concept.

The increasing black student enrollment in the Detroit Public Schools System, which is evident even in schools located at the city's boundaries, is demonstrated by the following tables reflecting significant increases in black student enrollment since 1969:

TABLE I

RACIAL DEMOGRAPHIC SHIFT 1969-1974
OF SELECTED SCHOOLS — DETROIT EASTSIDE

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
CARSTENS	37.4	48.0	62.3	73.2	82.6	88.3
GUYTON	17.2	30.6	49.5	64.1	73.9	77.9
HAMILTON	63.6	70.8	71.8	74.2	79.8	83.4
HOSMER	8.2	18.1	28.2	44.8	57.8	70.0
IVES	6.2	13.0	19.1	37.9	54.0	64.2
LINGEMANN	53.1	60.2	62.6	65.8	68.9	72.3
JACKSON J. H.	39.8	43.3	54.2	71.9	85.1	92.0
ROBINSON M. S.	—	—	69.1	84.8	88.7	92.6

1.

The District Court in 1971 predicted that in the 1975-1976 school year the black student enrollment would total 72 percent. The evidence taken during this remedial proceeding indicates that that figure was low. Black enrollment in the elementary schools exceeded 72% on September 27, 1974, and black enrollment system-wide on that date was 71.5%.

[1108]

TABLE II

RACIAL DEMOGRAPHIC SHIFT 1969-1974
OF SELECTED SCHOOLS — NORTHEAST DETROIT

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
COOPER	59.0	72.1	79.6	85.7	86.9	90.3
A. L. HOLMES	86.6	93.2	95.3	96.3	97.8	98.5
CLEVELAND J. H.	68.8	71.6	74.9	74.3	75.9	79.4
GREUSEL J. H.	69.5	73.6	75.9	78.5	82.2	81.4

TABLE III

RACIAL DEMOGRAPHIC SHIFT 1969-1974
ALONG WOODWARD AVENUE*

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
HAMPTON	68.8	75.1	60.7	70.6	75.3	81.5

*Woodward Avenue is a major thoroughfare in Detroit, which divides the city along east-west lines.

TABLE IV

RACIAL DEMOGRAPHIC SHIFT 1969-1974
OF SELECTED SCHOOLS ON DETROIT'S NORTH SIDE
(BORDERING EIGHT MILE ROAD)

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
BOW	13.6	17.8	27.9	44.7	57.4	68.6
GREENFIELD PK.	32.3	38.2	41.1	46.2	50.7	54.0
MARSHALL	57.3	65.0	69.3	75.1	81.7	84.6
MASON	48.6	52.7	61.6	69.7	77.2	83.5
WINSHIP	50.1	70.4	89.8	93.3	96.2	97.7
CLEVELAND J. H.	68.8	71.6	74.9	74.3	75.9	79.4
FARWELL J. H.	63.3	67.8	68.4	68.0	73.9	82.4
GRANT J. H.*	*21.7	*26.2	*27.8	*29.7	*38.1	*41.4
HAMPTON J. H.	*68.8	*75.1	95.5	97.1	98.1	98.8
PERSHING H. S.	57.7	63.8	73.1	81.0	83.4	85.6

*Elementary School Figures.

[1109]

TABLE V

RACIAL DEMOGRAPHIC SHIFT 1969-1974
OF SELECTED SCHOOLS IN NORTHWEST-WEST AREA
OF DETROIT

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
BURNS	31.4	59.8	80.0	90.0	94.5	97.1
CADILLAC	17.6	39.1	73.5	75.3	90.9	94.4
CRARY	4.5	20.6	40.9	61.9	83.0	89.1
DOSSIN	6.0	5.0	16.8	34.2	64.0	80.8
FORD	34.2	35.4	51.8	70.0	84.3	89.6
HERMAN	55.6	58.5	66.4	73.9	79.3	85.8
McFARLANE	77.6	82.0	89.9	93.9	95.7	96.5
NEWTON	14.5	21.8	27.8	45.1	66.9	76.9
PARKER	62.7	79.4	88.1	95.1	97.0	97.6
PARKMAN	7.8	12.8	29.9	47.8	68.4	78.3
COOLEY H. S.	58.9	76.3	94.0	97.4	99.3	99.6

TABLE VI

RACIAL DEMOGRAPHIC SHIFT 1969-1974
OF SELECTED SCHOOLS IN DETROIT'S SOUTHWEST AREA

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
CRAFT	88.4	86.8	84.3	92.1	91.7	91.3
ELLIS	66.9	71.6	74.0	72.5	77.0	83.8
OWEN	69.5	70.8	68.7	67.4	71.5	79.5

Shifting demographic patterns in Detroit are reflected not only in schools that are 70% or more black, but also in those schools that, though not yet majority black, will be so within a short period:

TABLE VII

RACIAL DEMOGRAPHIC SHIFTS 1969-1974
IN SELECTED SCHOOLS ON DETROIT'S NORTHWEST
AND WEST SIDES

School	Year					
	1969	1970	1971	1972	1973	1974
EMERSON	3.6	3.6	3.0	8.5	27.7	40.9
McKENNY	5.1	5.7	10.3	22.2	38.4	46.4
COOLIDGE	1.3	2.1	5.1	13.8	30.1	45.6

[1110]

TABLE VIII

RACIAL DEMOGRAPHIC SHIFTS 1969-1974
IN SELECTED SCHOOLS IN NORTHEAST DETROIT

School	Year					
	1969	1970	1971	1972	1973	1974
GRANT	21.7	26.2	27.8	29.7	38.1	41.4
LYNCH	10.4	6.7	12.8	18.0	30.9	47.8

Based on present trends, it is accurate to expect that the black enrollment of several schools on Detroit's northwest and east sides will be in excess of 70% black by the 1975-1976 school year:

TABLE IX

RACIAL DEMOGRAPHIC SHIFTS 1969-1974

PERCENTAGE BLACK ENROLLMENT

School	Year					
	1969	1970	1971	1972	1973	1974
BOW	13.6	17.8	27.9	44.7	57.4	68.6
COFFEY	—	29.0	33.2	43.6	51.8	68.8
EDISON	0.3	2.7	9.3	25.3	49.5	65.3
HOSMER	8.2	18.1	28.2	44.8	59.8	70.0

The Ford High School, whose attendance zone abuts Detroit's border, is located on Detroit's extreme northwest side. As indicated by the following table, Ford, presently 55% black, will in all likelihood be 60% black by the 1975-1976 school year if demographic trends continue:

TABLE X

RACIAL DEMOGRAPHIC SHIFT 1969-1974 IN
FORD HIGH SCHOOL

PERCENTAGE BLACK ENROLLMENT

	Year					
	1969	1970	1971	1972	1973	1974
	13.4	20.0	30.5	40.3	48.2	54.6

[1111] Based on current trends, the following schools, which have student population between 25% and 35% black, can expect to have substantial increases in black enrollment:

TABLE XI
RACIAL DEMOGRAPHIC SHIFTS 1969-1974

School	PERCENTAGE BLACK ENROLLMENT					
	Year					
	1969	1970	1971	1972	1973	1974
GOODALE	0.1	0.7	1.5	4.0	14.9	25.2
MACOMB	1.6	2.8	4.9	8.1	21.0	30.6
EMERSON J. H.	*3.6	*3.6	*3.0	8.4	19.9	30.6
MURPHY J. H.	6.5	9.8	12.7	6.3	20.1	30.3
TAFT J. H.	0.3	0.7	2.4	12.8	21.0	34.5

*Elementary School Figures.

8. These tables clearly demonstrate the City of Detroit's changing demography and conclusively reflect significant increases in black student enrollment since 1969. The tables point out that schools that were as low as 4.5% black in 1969 had increased to as much as 89.1% black by 1974. The demographic patterns in Detroit reflect a large number of schools that are 70% or more black and it is apparent that many schools that are not yet majority black will become majority black within a short period of time. For example, Table VII above contains a sampling of schools located on the northwest side of Detroit that will experience a majority black school population within the coming school year. Similarly, schools located in the northeast section of Detroit that are presently 40-50% black will be majority black within the coming school year. If present demographic trends continue, schools that now have student enrollment ranging between 20 and 40% black can expect to have substantial increases in black enrollment. Although the Detroit school system as a whole is experiencing a 2% annual increase in black enrollment, the following table demonstrates that individual schools in many areas undergoing racial demographic shifts have experienced increases in black enrollment that are as high as 16.9%. These shifting demographic patterns are rapidly changing Detroit's residential patterns; mixed residential areas may now be found in all parts of the city, including areas bordering the suburbs.

AVERAGE YEARLY PERCENTAGE
RACIAL CHANGE IN SELECTED SCHOOLS
BETWEEN 1969-1974

School	PERCENTAGE BLACK ENROLLMENT		
	1969	1974	Average Yearly % Change
Emerson	3.6	30.6	5.4
Marshall	57.3	84.6	5.5
Kennedy	64.6	93.1	5.7
Herman	55.6	85.8	6.0
Cooper	59.0	90.3	6.3
Van Zile	46.9	79.7	6.6
Parker	62.7	97.6	7.0
Mason	48.6	83.5	7.0
Lynch	10.4	47.8	7.5
McKenny	5.1	46.4	8.3
Coolidge	1.3	45.6	8.9
Cerveny	51.5	97.5	9.2
Winship	50.1	97.7	9.5
Carstens	37.4	88.3	10.2
Bow	13.6	68.6	11.0
Ford	34.2	89.6	11.1
Ives	6.2	64.2	11.6
Hosmer	8.2	70.0	12.4
Newton	14.5	76.9	12.5
Edison	0.3	65.3	13.0
Burns	31.4	97.1	13.1
Guyton	17.2	77.9	12.1
Parkman	7.8	78.3	14.1
Dossin	6.0	80.8	15.0
Cadillac	17.6	94.4	15.4
Crary	4.5	89.1	16.9

9. The Board began to undertake steps to desegregate as early as 1970 and [1112] was precluded from doing so only by the passage of Act 48 of the Michigan Public Acts of 1970 (Mich. Comp. Laws § 388.171) by the Michigan Legislature. The Board has followed the policy of transporting students to relieve overcrowding in such a manner as to promote desegregation. In the 1974-1975 school year the Detroit Board was able to increase the percentage of black students in many schools that previously were nearly all-white. The table next annexed demonstrates the dramatic increases in black student enrollment at various schools accomplished by such transportation:

**PERCENTAGE BLACK ENROLLMENT IN SCHOOLS
RECEIVING STUDENTS TO RELIEVE OVERCROWDING**

1974

School	Without Transportation	With Transportation
Northwest Area		
Ann Arbor Trail*	2	39
Burgess	4	21
Carver*	0	18
Dow*	32	43
Harding	18	22
Healy*	0	18
Houghton*	4	12
Leslie	0	32
Lodge*	0	27
Mann	14	25
Weatherby	3	16
Yost*	0	42
Northeast Area		
Burbank*	0	16
Hanstein*	0	23
Marquette*	6	12
McGregor*	0	34
Pulaski*	2	14
Robinson	9	9
Trix*	0	24
Wilkins	6	16

*Schools that abut the Detroit city limits.

C. Plaintiffs' Plan

10. The plaintiffs' desegregation plan, submitted on April 1, 1975 pursuant to an order of this court and revised on April 30, 1975, was designed by Dr. Gordon Foster, Director of the University of Miami Title IV Desegregation Center. The plan as devised by Dr. Foster deals solely with pupil reassignment. The rationale and the ultimate goal of the plan are that, as far as possible, every school within the district must reflect the racial ratio of the school district as a whole within the limits of 15 percentage points in either direction. Dr. Foster admitted that the 15% figure was arrived at arbitrarily. Under Dr. Foster's definition any school whose racial composition varies more than 15% in either direction from the Detroit system-wide ratio is racially identifiable. Accordingly, an elementary school with 57.3%-87.3% black enrollment, a junior high school with

58.0%-88.0% black enrollment and a senior high school with 51.9%-81.9% black enrollment are desegregated schools. Carrying Dr. Foster's plan a step further, an elementary school that is 56% black is a racially identifiable white school and an elementary school that is 85% black is a desegregated non-racially identifiable school. (Plaintiffs' plan, page 7A.)

11. In developing plaintiffs' plan, Dr. Foster testified he explored the extent to which desegregation could be effected by each of the following commonly accepted techniques: redrawing zone lines between contiguous zones of differing racial composition, pairing schools within these zones, pairing non-contiguous zones, changing feeder patterns in affected schools, examining various building utilization techniques, use of temporary space and changing grade structures in particular buildings. Dr. Foster examined these alternatives in an effort to achieve his desired racial mix. Thereafter, he subdivided the system into five clusters with similar racial compositions, each comprised of a group of high school constellations. (Plaintiffs' plan pages 3A, 4A.) Dr. Foster proceeded to alter the grade structures at particular schools within each cluster and schools within the clusters were then paired. The pairing of schools was accomplished by selection of all the "racially identifiable" white schools and the "racially identifiable" black schools in order of size and percentage of children by race. Thereafter, children in the newly created pairings were exchanged to achieve ratios conforming to Dr. Foster's definition of a desegregated school. The plan also created new feeder patterns for [1113] junior and senior high schools that ultimately achieve a racial mix falling within the same parameters.

Plaintiffs' pupil reassignment plan does not include kindergarten and pre-kindergarten children; provision has been made for them to attend the school nearest their home, which in many instances necessitates changes in facility utilization. Under the plaintiffs' plan present high school juniors, although included in the pupil assignment process, are given the option of remaining at their present school and

graduating there, assuming that to do so would not cause or maintain segregation. (Plaintiffs' plan page 5A.)

12. Under the plaintiffs' plan, not only are many students reassigned to elementary schools outside of their neighborhood for half of their elementary years but, as a result of the pairings and changes in feeder patterns into junior and senior high schools, many students will attend a school out of their home neighborhood for between eight and eleven years. See, e.g., plaintiffs' plan for Webster, Birney, Peck, Amos, Beard, Larned, Higginbotham, Glazier and McGregor schools. Under plaintiffs' plan only the racial ratio that could be achieved by a particular pairing was considered in the selection of schools for the pairings. Consequently, the plaintiffs' plan creates many problems relating to building capacity. For example, proposed enrollment exceeds school capacity at 18 junior high schools.² In addition, some elementary school pairings under the plan would result in over-enrollment. While plaintiffs' plan attempts to minimize problems of capacity by creating "swing grades" with the variable assignments of the 6th, 7th and 9th grades, this technique results in undue disruption of grade structures. At the senior high school level, the plaintiffs' plan has avoided problems of capacity by assuming a dropout correction factor of .7069 for blacks and .9426 for whites and others. (Plaintiffs' plan, page 6A.) As a result, there would be 13,865 fewer blacks and 1,145 fewer whites in the three senior high grades than in the three junior high grades. However, no evidence was presented that justifies reliance upon such a dropout factor; consequently, capacity problems may be created by plaintiffs' plan at the senior high school level as well. Reliance upon a 30% dropout rate for black students at the senior high school level would disrupt the entire school system if the projected number of dropouts did not materialize. Moreover, even if such a statistic were supported by credible evidence, plaintiffs have not allowed for the possibility that the dropout rate would decline in a desegregated system.

2.

In addition, under plaintiffs' plan, the Columbus Junior High School would be over capacity were it not for the utilization of temporary spaces.

13. We find that a large number of schools are paired solely to achieve a desired racial ratio in each of the paired schools. (Tr. Vol. 18, p. 45.) The arbitrary pairings devised in plaintiffs' plan necessitate the transportation of thousands of black school children many miles to schools that still remain 80% or more black. The following table demonstrates that various schools were included in plaintiffs' plan despite the fact that only insignificant changes occurred in their racial composition:

Plan Page	SCHOOL	1974	PROPOSED
1	McCulloch	99.7	89.8
14	Ilene	99.5	89.2
14	King	99.2	88.9
29	Duffield	99.2	88.4
8	Columbian	99.6	88.2
8	Columbian Primary	100.0	87.3
27	Bell	99.7	87.3
25	Marxhausen Primary	98.8	86.8
12	Ruthruff	99.2	86.5
5	Angel Primary	98.8	86.4
1	Joffe Primary	100.0	86.3
2	Sampson	99.7	86.1
27	Berry	99.8	85.8
13	Guest Primary	97.5	85.7
11	Noble	98.8	85.5
12	Herman	85.8	85.4
25	Campbell	100.0	85.3
30	Bunche	100.0	85.0
11	Sherrill	99.9	84.7
9	Parker	97.6	84.6
11	Courtis	99.6	84.6
24	Marshall	84.6	84.4
11	Barton	100.0	84.2
32	Tendler	95.3	83.6
30	Lingemann	72.3	83.4
[1114]			
8	Ellis	83.8	83.0
15	Higginbotham	100.0	82.7
27	Keith Primary	99.6	82.6
30	Bellevue	96.7	82.1
28	Krolik	100.0	81.8
12	Alger	100.0	81.6
11	McFarlane	96.5	81.4
13	Cadillac	94.4	81.0
1	Woodward	99.9	81.0
4	Chaney	98.3	80.7
1	Roosevelt	99.9	80.7
9	Monnier	97.0	80.4
4	Goldberg	98.9	80.4
14	Dossin	80.8	80.8
2	Turner	99.4	80.1
4	Owen	79.5	80.0

It is apparent that, for example, plaintiffs' selection of the Lingemann School was made solely because white students were needed for transfer to the Bunche School to accomplish plaintiffs' desired balance. Presently, the Lingemann School is 72.3% black and thus is a desegregated school by plaintiffs' definition. After application of plaintiffs' plan Lingemann School becomes 83.4% black. Lingemann was included in plaintiffs' plan irrespective of the fact that it is located in a naturally integrated neighborhood that has attained a measure of racial stability. The plaintiffs' plan groups the Craft, Ellis, Glazier and McKinstry Schools and transports 753 students; as a result, the Ellis School is reduced from 83.8% to 83.0% black. In the Carrie, Morley and Peck School grouping, the Carrie School is presently 58% black and thus not racially identifiable according to plaintiffs' definition. After transporting children, Carrie is reduced to 54.1% black; black students are bussed out of Carrie solely to be added to the black population at Morley.

In addition, after transporting thousands of students, there are a number of schools that are under or barely exceed the acceptable minimum percentage of black enrollment set by Dr. Foster. The following table demonstrates the racial mix achieved at selected schools:

Plan Page	SCHOOL	% Black
5	Amos	50.7
10	Carver	52.0
21	Richard	52.4
16	Cooke	52.5
13	Houghton	53.4
6	Higgins	54.1
7	Cary	54.1
22	Trix	54.9
31	Burbank	55.1
31	McGregor	55.4
6	Bennett	55.8
1	Webster	56.1
17	Larned	56.1
19	Burt	57.1
13	Yost	57.4
23	Grayling	57.4
6	Harms	57.6
20	Law	58.1
10	McColl	58.5
10	Maybee	58.5
23	Greenfield Union	58.6

Plan Page	SCHOOL	% Black
9	Everett	58.6
23	White	56.3
27	Clark	59.0
3	Burton	59.4
19	Holcomb	59.5
22	Fleming	59.5
13	Edison	59.9
3	Beard	60.0

Groupings of schools with comparable racial ratios remain even after the application of Plaintiffs' plan. Schools containing enrollment over 80% black are grouped in a contiguous area and follow a consistent pattern. Similarly, schools with enrollment under 60% black are grouped in contiguous areas and follow an easily discernible pattern. (See Defendant Board of Education's Exhibit 10.)

14. The plaintiffs' reassignment plan requires the transportation of 77,303 children, of which 48,312 are elementary school children and 28,991 are junior high school children. Deducting 5,954 children presently being transported, plaintiffs have arrived at a total of 71,349 students requiring transportation under their plan as proposed.³ Thereafter, plaintiffs use a factor of four daily round trips per bus with 66 pupils per bus and estimate that 271 additional busses would be required to effectuate their reassignment plan. (Plaintiffs' plan p. 7A.) There is no credible evidence [1115] to support plaintiffs' assumption that every bus could be utilized to make four round trip runs. The plaintiffs' estimate of 271 buses is further dependent upon the unrealistic assumption of utilizing one pick-up point for 66 school children without consideration of the distances students would have to walk to arrive at the pick-up point. Moreover, their estimate does not consider the ethnic composition of any area surrounding a pick-up point.

Plaintiffs' present estimate of 77,303 students is not far below their 1972 estimate of 82,000 children requiring

3. We have arrived at varying estimates that range 77,000 and 81,000 students requiring transportation under plaintiffs' plan.

transportation. The most credible estimate of the number of buses required for plaintiffs' 1972 plan was 900. Expert testimony given in 1972 estimated that a school district could transport an average of 100 students for each bus in service. (Witness Kuthy, Tr. pages 122-124, book 2; March 15, 1972.) Based upon this testimony, which was not challenged by plaintiffs, plaintiffs' plan would require the procurement of approximately 840 buses, including sufficient spares.

Accordingly, we find that the plaintiffs' plan involves the transportation of thousands of students, the great majority of whom would be transported from one predominantly black school to another predominantly black school, involves bus runs within the city of Detroit of up to thirty-eight minutes without taking account of time for loading and unloading and would result in many children spending between nine and eleven years in schools as far as five to twelve miles from their neighborhood.

15. The plaintiffs' plan, based upon a definition of racial identifiability as beyond a range of 15% from the system-wide racial mix, is rigidly structured. The plan does not consider the past or present demography of the Detroit school district, more particularly ignoring population shifts that have been occurring over the past decade. Moreover, the plan does not consider the possibility of resegregation in the City of Detroit. Although Dr. Foster testified that his plan purports to avoid the possibility of resegregation, this testimony is premised upon the assumption that after application of the plan there would be "no pockets where people can go." (Tr. Vol. 19, page 166.) There is no credible evidence in this record to justify the assumption that adoption of plaintiffs' plan would lessen the chance of resegregation within or without the city; Dr. Foster's testimony fails to take account of the developed suburban areas that circumscribe the city. Accordingly we find that the plaintiffs' plan does not include provisions for promoting racial stability and avoiding resegregation. We re-affirm the prior finding of this court that:

"It would be a natural, foreseeable and probable consequence of the implementation of the Plaintiffs'

plan that the trend of the Detroit schools towards a higher percentage of black students and a lower percentage of white students will be sharply accelerated." (Tr. March 14, 1972, pages 584-586.)

D. *Detroit Board of Education Plan*

16. The Detroit Board of Education submitted a plan that provided for transportation of approximately 51,000 students. Interwoven into the Board's plan is the provision for magnet schools at both the middle school and senior high school levels to aid in attaining maximum desegregation. The goals of the Board's plan include establishing maximum effective desegregation, removing racially identifiable white schools and promoting interracial understanding and respect in a diversified school district. The Detroit Board plan takes into consideration the demography of the Detroit School District and recognizes that the Detroit School System is now 71.5% black system-wide (72.3% black at the elementary school level). The Board plan acknowledges that since 1969, the school district population has declined from 293,859 to 257,396, which represents a loss of 36,463 students or a 12% [1116] decline. During this five-year period, the black school population has increased by 3500 students and over 40,000 white students have left the system. Accordingly, only 67,833 white students are presently enrolled in the Detroit School System as compared with 189,563 black students.

Under the Board plan, the Detroit School System continues to operate on a feeder pattern. The pairings have been devised to provide that every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school. Although regional lines are crossed in a few instances the plan generally respects regional boundary lines, which were brought about by the State's attempt to decentralize the school system.

17. Like the plaintiffs' plan, the Board plan explores each of the commonly accepted techniques for desegregation. Like the plaintiffs' plan, the Board plan revamps grade structures at the elementary level by providing that some will accommodate K through 3 and others K plus 4 through 6 and thereafter pairs various schools, providing transportation between the schools so paired. Through this process of pairing and clustering schools, the Board plan attempts to eliminate racially identifiable white elementary schools in Regions 2, 3, 4, 6 and 7. The reassignment plan desegregates the junior and senior high schools by changing the feeder patterns into the junior and senior high schools, but at the same time the plan attempts to respect the concept of high school constellations made up of neighborhood elementary schools and neighborhood junior high schools feeding into an area high school. Under the feeder plan realignment the senior high schools will be desegregated by September, 1976. Eight senior high schools will remain unaffected by the plan.

The Board plan attempts to achieve a 40%-60% black racial mix in the presently white identifiable schools. Although the Board purports not to strive for fixed racial quotas, we find that it in fact does so. In developing its plan the Board sought to determine the racial ratio that provided maximum desegregation while preserving racial stability. The Board concluded that a racial mixture between 40% and 60% black provided a healthy and stable racial mix. The Board's statistical data demonstrates that where elementary schools in a high school constellation range from 75% to 95% black, the high school generally is 95% to 100% black; White students simply leave the system by the time they reach high school. Similarly, the statistical data establish that a racial mixture that does not exceed 60% black provides a degree of stability. Some of the pairings selected by the Board plan, particularly in Region 2, fall below the goal set by the Board only because of the high percentage of Spanish-speaking students in these schools, which ranges as high as 20% in some instances. To accommodate this factor the Board permitted the percentage of black students to fall below their target for racial mix.

18. The Detroit Board's pupil reassignment plan does not affect the schools in Regions 1, 5 and 8; each of these three regions will remain over 90% black. The basic premise of the defendant Board's plan is to eliminate all of the schools with black enrollment below 25% and bring them to the level of 40-60% black. These schools are located largely on the outer fringes of the city. The plan leaves untouched 95 schools, most of which are between 95-100% black and are located within the inner city.⁴ Under the defendant Board's plan many [1117] schools will operate over capacity, while some schools in the inner city will have substantial capacity available. The Board decided to leave 95 schools untouched principally because the Board found it impractical to desegregate the student bodies of these schools "without undue hardship of long distance travel." The Board's plan acknowledges that there are too many black students in the system to provide all of them with a desegregated experience while at the same time maintaining stability.

19. The pupil transportation portion of the Detroit Board plan anticipates the daily transportation of approximately 51,000 children between paired schools. The evidence suggests the need for a fleet of busses ranging between 335 and 425 66-passenger vehicles. The defendant Board has suggested that each bus would make two or three runs per day. (Defendant Board's Exhibit 28.) However, as indicated above with respect to the plaintiffs' plan, credible evidence has not been presented by either party to aid the court in making an accurate determination of the number of busses needed to transport this vast number of children. The Detroit Board lacks the experience needed to manage a transportation fleet and does not have available the appropriate data needed to devise an efficient transportation

4.

In addition to the 95 schools untouched by the pupil reassignment portion of the Board's plan, 16 schools that are already desegregated according to the plaintiffs' definition are untouched, 6 elementary schools are not paired but are included in desegregated feeder patterns and 6 schools are taken out of service.

system. This court found it necessary to instruct the Detroit Board to produce a sufficient data base to permit a computer print-out of a grid showing the exact racial composition of the student population in any particular area. Such data are necessary to develop an efficient transportation scheme. Moreover, when such data are available there will be no justification for transporting children into an area without consideration of the ethnic composition of that area.

Transportation under the defendant Board's plan involves much shorter distances than the plaintiffs' plan. School pairings were made to allow transportation routes along major thoroughfares.

20. In addition to reassigning pupils between paired schools the Detroit Board's plan includes a provision to continue certain magnet schools. Pursuant to an order of this court on December 3, 1970, each of the eight regions created a magnet school, relying upon voluntary attendance. Although these magnet schools did not reach the racial mix sought by either the plaintiffs or the defendant Board, they did serve to provide some degree of desegregation.

The Board plan also provides for the creation of four vocational high schools, specializing in medical science, transportation, construction and the commercial arts. These four vocational schools will operate under an enrollment controlled to simulate the system-wide racial composition. In addition, the Board's plan creates two technical high schools with enrollment open to students throughout the entire school system and creates city-wide high schools with specialized curricula. The enrollment of these schools will be controlled to conform to the system-wide racial ratio. The vocational, technical and city-wide schools are designed as magnet schools to attract students from throughout the school system as a means of further desegregating the school system.

The Board plan further suggests that four co-curricular programs be implemented on a city-wide basis in order to

provide additional children with a desegregated school experience. These programs would include music education, art, physical education and athletics. (Board plan page 30.)

Finally, the Board plan suggests the creation of cultural junior high school consortia designed to provide students from substantially black majority schools with an opportunity to spend part of their academic week with white students from other schools in various cultural centers in the greater Detroit area. The Board proposes that these classes be held at the Art Institute, the Detroit Public Library, the Merrill Palmer Institute, [1118] Wayne State University, Shaw College and Lewis Business School.

E. Educational Components

21. In addition to the vocational and career education and the junior high consortium the plan submitted by the Detroit Board includes the following educational components:

- a. In-Service Training
- b. Guidance and Counselling
- c. School-Community Relations
- d. Parental Involvement
- e. Student Rights and Responsibilities
- f. Testing
- g. Accountability
- h. Curriculum Design
- i. Bilingual Education
- j. Multi-Ethnic Curriculum
- k. Co-curricular Activities

The plan as submitted by the Detroit Board does not distinguish between those components that are necessary to the successful implementation of a desegregation plan and those that are not. Moreover, the defendant Board's plan does not inform the court of the extent to which any of these components may currently be in effect in the Detroit public school system; nor did the Board, either through its plan or

through expert witnesses, provide the court with information adequate to permit the court to evaluate the budgetary requests made for each of the components. Accordingly, the court found it necessary to obtain a report from Dr. Louis Monacel outlining the extent to which any or all of these components currently exist in the Detroit School System. (See "Comparison of Existing Personnel, Programs, and Activities with the Personnel, Programs and Activities Required in the Detroit Public Schools Desegregation Plan.") The court also found it necessary to seek an evaluation of each of these components from Dr. Michael Stolee, one of the plaintiffs' expert witnesses. Finally, the court found it necessary to obtain additional information from its court-appointed experts to permit a proper evaluation of each of the components proposed in the Board plan.

22. We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing, discriminatory counseling and discriminatory application of student discipline. In a system undergoing desegregation, teachers will require orientation and training for desegregation. Parents need to be more closely involved with the school system and properly structured programs must be devised for improving the relationship between the school and the community. We agree with the State Defendants' that the following components deserve special emphasis: (1) In-Service Training; (2) Guidance and Counseling; (3) Student Rights and

Responsibilities (see this court's order, June 13, 1975); (4) School-Community Relations-Liaison; (5) Parental Involvement; (6) Curriculum Design; (7) Multi-Ethnic Curriculum; and, (8) Co-curricular Activities. Additionally, we find that a testing program, vocational education and comprehensive reading programs are essential. We find that a comprehensive reading instruction program together with appropriate remedial reading classes are essential to a successful desegregative effort. Intensified reading instruction is [1119] basic to an educational system's obligation to every child in the school community (Tr. Vol. 19 pp. 40-41; Vol. 22, p. 47). Finally, the court finds that an effective court-oriented monitoring program is necessary for effective implementation of a desegregation plan to assure that delivery of educational services will not be made in a discriminatory manner.

F. School Financing

23. The Detroit School District receives operating funds by levying a property tax, a portion of which is voted by the electors of the school district and a portion of which is allocated by the Wayne County Tax Allocation Board from the 15 mills constitutionally authorized to be levied without a vote of the electorate. The school district cannot levy additional millage without a favorable vote of the electorate. The Detroit School District presently levies 22.51 mills for operating purposes and 2.25 mills to finance a prior \$68 million deficit (pursuant to Public Acts 1 and 2 of 1973), a total of 24.76 mills. This tax effort produces approximately 38% of the school district's total budget. State aid comprises 47% of the total budget. The State aid formula is based upon the number of students in the school district and upon the State Equalized Valuation (SEV) of property in the district. Additional state aid is provided by special grants in the form of entitlement and competitive funds. Federal funds provide the remaining 15% of the budget. (Tr. Vol. 7, pp. 87-95; Vol. 25, pp. 106-107.)

5. See State Critique of Detroit Board's Desegregation Plan, page 39.

24. The State School Aid Act contains a formula designed to equalize revenues among school districts to the extent that disparities are the result of differences in SEV per pupil among districts. Over the preceding five-year period Detroit's State Equalized Valuation (SEV) has remained relatively static while the SEV in the remainder of the state generally increased. This trend can be explained by the movement of industry, commercial institutions and people to the suburbs and the huge amounts of land used for expressways in Detroit, which remove the property from the city's tax rolls.

Because the per capita State Equalized Valuation in Detroit is 50% lower than the average for the 20 largest cities in Michigan, the school district must levy additional millage to obtain a yield equal to that of the other cities. (Tr. Vol. VII, p. 108, Defendant Board's Exhibit 31.) Because of legislation directed specifically to the Detroit School District, it is required to operate on a balanced budget and must file monthly reports with the State Auditor General. See Mich. Comp. Laws Sections 388.1238-1240.

25. The total of all municipal taxes paid by Detroit citizens translates into a municipal millage equivalent of 84.83 mills. This is the highest tax burden in the state and is 55% higher than the state average. Only 16 cities in the State of Michigan levy an income tax; among them, Detroit's rate is the highest. However, Detroit's per capita income tax yield is substantially lower than the other 15 cities. Moreover, county taxes paid by Detroit citizens are 14.4% higher than the state average, and Detroit municipal taxes are 14.6% higher than the state average.

Detroit taxpayers also have the highest municipal overburden in the state. (Defendant Board's Exhibits 30, 33 & 41.) The State offers assistance to school districts whose municipal over-burden (i.e. the total property tax rate in the district excluding the amount levied for school operating purposes) exceeds 125% of the state average (Bursley Act, Mich. Comp. Laws Section 338.1125). The Act is designed

to aid school districts throughout the state that are unable to raise sufficient tax revenues because their taxpayers refuse to approve higher millage requests in the face of numerous other taxes imposed on the district by other local taxing authorities. (Tr. Vol. 7, pp. 103-104.) Presently, the municipal overburden section of [1120] the Act is only approximately 28% funded by the Michigan Legislature. If the section were fully funded, the Detroit school district would receive an additional \$61,682,000; if it were 50% funded during the 1974-75 school year, the school system would have received an additional \$18,787,000. (Tr. Vol. 7, pp. 116-120.) Thus, the State does not supply the Detroit school district with as much money as the Act provides.

26. The power equalizing section of the State School Aid Act guarantees that, subject to certain conditions, each school district will have available \$975 per student. If local tax revenue is insufficient to generate this amount, state aid will fund the balance. Complete funding of the balance, however, is contingent upon a local school district millage levy of 25 mills for operating purposes; where a school district levies a lesser amount, state aid is reduced proportionately. While 2.25 mills of Detroit's levy goes to debt retirement rather than operating purposes, the entire 24.76 mills is counted in the formula for state aid. However, state aid does not provide operating revenue to replace the 2.25 mills used for debt retirement. Thus, the 24.76 levy produces operating revenue of only \$916 per student in local taxes and state aid. (Tr. Vol. 7, pp. 93-107.)

The Wayne County Tax Allocation Board allocates .64 mills to the Detroit School District, which is passed on directly to the Detroit Library Commission. Since the majority of school districts in Wayne County receive 8.65 mills from the Tax Allocation Board and Detroit receives only 8.01 mills exclusive of the library allocation, this additional .64 mills should be counted in the State Aid calculation; however, it is not. If it were, the district would have a total levy of 25.40 mills and thus would be entitled to the maximum state aid guarantee under the power equalizing section of the Act.

The Detroit School District's millage levy of 24.76 mills is slightly below the state average of 26.15 mills. However, when this millage levy is added to all other taxes assessed against a Detroit taxpayer, the tax burden is greatly in excess of the state average. (Tr. Vol. 7, p. 104; Vol. 24, p. 147.) This burden has caused Detroit taxpayers to reject requests for additional millage. Seven of the ten millage elections over the past eight years have failed. Of the three successful votes, one approved replacing a 1% income tax that the School Board was authorized to levy pursuant to Public Acts 1 and 2 of 1973 with a 7 mill property tax; another merely renewed an already existing 7.5 mills for an additional ten years. (Defendant Board's Exhibit 40; Tr. Vol. 24, pp. 143-144, 150-151; Vol. 7, p. 140.) It can be reasonably expected that the already heavy burden upon Detroit taxpayers will cause them to reject further requests for millage increases in the near future.

27. The cost of education is a function of the size of the system and the Detroit School System, with an enrollment of 257,000 students, is the largest school district in the State of Michigan. Moreover, the fact that Detroit's ranking for per pupil expenditure is above the state average is insignificant because per pupil educational costs are greater in urban areas. Additionally, the drop-out rate in the Detroit School District has been increasing over the past ten years; the reduction in enrollment results in less State aid under the pupil membership formula of the State Aid Act at the same time that the cost of delivering educational services is increasing.

28. Prior to a 1971 legislative enactment, the Detroit School District did not receive any State reimbursement for in-city transportation expenditures, even though reimbursement was provided to rural and suburban school districts. (Tr. Vol. 24, pp. 103-105.) The Detroit School District first received an allocation for transportation in the 1973-74 school year, which was based on costs expended during 1972-73. However, [121] unlike other districts, which were reimbursed for 75% of their transportation expenditures,

Detroit was reimbursed for only 92% of the 75% permitted under the Act. Moreover, reimbursement for the Detroit School District was based upon the Wayne County average transportation costs of \$47.00 per pupil, while the Detroit School District actually expended \$185.00 per pupil. Consequently, Detroit was reimbursed for only \$288,770.39 of the \$1,857,367 expended for transportation in 1972-73, and \$469,981.15 of the \$2,696,133 expended for transportation in 1973-74. That Detroit's transportation costs are so high may be explained by several factors. First, transportation costs are necessarily greater in urban areas than in rural or suburban areas. Second, because Detroit received no in-city transportation reimbursement whatsoever prior to 1971, Detroit does not have its own bus system and is forced to rely on more costly chartered buses to transport elementary and junior high school students. Third, Detroit is required to subsidize bus tickets for indigent high school students, which, in the long run, is also more costly than operating a transportation system. (Tr. Vol. 24, pp. 107-123; Vol. 25, pp. 19-20.)

G. Faculty Assignments

29. The teacher population in the Detroit School District is 49.5% black. After having established convincingly that fixed racial ratios for pupil reassignments destroy stability, the Detroit Board desegregation plan suggests a scheme for teacher reassignments that achieves a 50-50 black-white racial mix in every school in the district. This approach is overly simplistic. It fails to take account of the qualifications of a teacher to teach the subject and grade level, the necessity of balancing schools with respect to teacher experience and the necessity of considering the sex of the teacher, all of which are necessary ingredients for quality desegregated education. To seek a fixed racial mix, without more, is undesirable and arbitrary.

Witnesses have acknowledged that the 50-50 racial quota for every school in the district was inserted in the Board's desegregation plan for the purpose of making the district

eligible for Emergency School Aid Act (ESAA) funds. However, the parties did not produce credible evidence that Federal funding was denied because of improper faculty distribution rather than because of poorly documented Board applications for such funding. Nor did the parties produce evidence of the Federal requirements for teacher assignments in a desegregated system. We note that 45 CFR 185.44(d)(3) does not require a fixed racial quota for every school:

"(3) In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by 185.43(b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in 195.11(a), conform to the requirements of such plan with respect to assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 percentum and 125 percentum of the proportion of such minority group teachers which exist on the faculty as a whole." (Pending proposal per 40 Fed. Reg., No. 61 part III, 14173, March 28, 1975.)

It is apparent from the quoted regulation that a school district that has been [1122] found guilty of segregation of staff and that is not yet subject to a court desegregation order may apply for a waiver of disqualification by making assignments "so that the proportion of minority group full-time classroom teachers at each school is between 75 percentum and 125 percentum of the proportion of such minority group teachers which exist on the faculty as a whole." Thus, a school district with approximately 50%

minority that has been found guilty of segregation of staff may qualify by demonstrating teacher assignments that conform to 37.0% to 62.0% black. However, the Detroit School System has never been found guilty of *de jure* staff segregation.

The plan submitted by the plaintiffs does not contain any proposal dealing with faculty reassignment; plaintiffs concluded their critique of the faculty reassignment provision in the Detroit Board's plan by stating that they had no desire to resolve collective bargaining disputes unless and until they interfered with constitutional rights of pupils. Notwithstanding this stated position, the only evidence produced in this record concerning teacher reassignments was presented by the plaintiffs, who made reference to Defendant Board Exhibit 6. This exhibit includes summaries of the identification of *educational personnel* by race. Educational personnel consists of more than just teaching staff; it also includes principals, department heads, counselors, library personnel, audio-visual personnel, school-community agents, etc. Thus, whatever correlations plaintiffs draw from this data is incompetent evidence of *faculty* segregation.

There is certainly insufficient evidence in this record to justify a finding that the ordinary administrative and collective bargaining processes of the parties will not satisfy the necessity of having a proper racial mix among the teaching staff of the school district. Moreover, when this court's desegregation order is implemented the necessity of additional teacher transfers on a desegregated basis will become apparent. There is sufficient time for this court to obtain proper and adequate evidence to determine what orders will be essential to achieve a plan for complete desegregation of pupils, faculty and staff.

IV. CONCLUSIONS OF LAW

A. *General Analysis of Both Plans.* The plaintiffs' and defendant Board's desegregation plans employ the same general techniques for desegregating the Detroit School

System. Both plans pair and cluster schools, fracture grade structures and change feeder patterns of the affected schools. The pairings involve the exchange of one-half of the student population from one school with one-half of the student population of the other. Moreover, both plans provide for massive bussing.⁶ Although employing similar methods for desegregation, the parties differ as to what constitutes desegregation, each asserting that his plan is more "feasible", "workable", "effective" and "realistic." These, of course, are proper criteria for testing an acceptable plan. *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Plaintiffs' approach to desegregation was devised by Dr. Gordon Foster, Director of the University of Miami Title IV Desegregation Center. Dr. Foster began by devising an arithmetical ratio for defining a racially identifiable school. Under his definition, any school that varies more than 15% in either direction from the system-wide racial ratio is racially identifiable. Plaintiffs' plan thus accepts as desegregated any elementary school that ranges between 57.3% and 87.3% black, any junior high school that ranges between [1123] 58% and 88% black and any high school that ranges between 51.9% and 81.9% black. The plan divides the system into five clusters. Racially identifiable black and white schools within each cluster are paired and one-half of the student body of each is transported between the schools. To accommodate school reassignments, grade structures are altered at all schools. Additionally, all feeder patterns are changed to accomplish desegregation of the junior and senior high schools. The plaintiffs' plan does not include any component other than student reassignment.

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Defendant Board's plan, according to the court's count, would transport between 51,000-56,000 students, affecting 159 schools. The plaintiffs' plan, according to our count, would bus between 77,000-81,000 students and affect virtually every school in the system.

Unlike the plaintiffs' plan, which proposes to bring every school in the district within 15 percentage points of the system-wide racial mix, the goal of the Detroit Board's plan is to eliminate only the racially identifiable white schools, which are located largely in the outlying sections of the city. Approximately one-half of the district's 218 elementary schools will not be touched by the plan. The Board has determined that a school that has 75% or more of one race is racially identifiable. The Board's plan seeks to attain a 40% to 60% black enrollment in each school involved in the plan, although the presence of Spanish-speaking students, especially in Region Two, brings black enrollment below these percentages in some schools.

The Board's plan affects approximately 55% of the total student enrollment, or approximately 141,554 students (State critique, p. 7) and requires transportation for 51,000 students over relatively short distances. The plan gradually changes the racial ratios of the students in the junior and senior high schools by altering feeder patterns. The Board's plan generally respects regional boundary lines and does not affect three of the district's eight regions.

As an integral part of the pupil reassignment portion of its plan, the Board seeks to continue the operation of one magnet school in each region. The plan also creates a junior high school consortium and co-curricular programs to achieve desegregation at this level. Moreover, the plan provides for the establishment of four city-wide vocational high schools and two additional technical high schools that will have enrollments controlled to conform to the system-wide racial ratio. Additionally, the Board's plan contains several educational components, which involve every school in the system.

B. The Plaintiffs' Plan. Our first objection to plaintiffs' plan is that it is too rigidly structured. It controls the entire educational life of a child. Not only does the plan reassign elementary children miles from their neighborhood schools, but because of new feeder patterns into junior and senior

high schools many students will attend schools many miles from their home for eight to eleven years of their school life. Generally, courts have approached desegregation problems with flexibility, recognizing, as they must, that they are dealing with constitutional and equitable rights of children. Plaintiffs' plan will not permit such flexibility. It does not take account of demographic trends or population proportions, black or white. As an inevitable consequence, most schools are 75-85% black. Once implemented, it would identify the entire school district as black.

The plan's sole purpose is to achieve a racial mix within 15% of the system-wide ratio in every school in the district. We reject plaintiffs' contentions that this is the only method that will desegregate the Detroit School System, that their plan eliminates racially identifiable schools and that their plan can be implemented immediately. While plaintiffs' plan increases the percentage of blacks in formerly racially identifiable white schools, this could be accomplished as well by a more flexible plan. Nor does plaintiffs' plan eliminate all racially identifiable schools; it is clear to us that a school that is 85% black, although within plaintiffs' parameters, is a racially identifiable black [1124] school. Further, as will be demonstrated, there are serious obstacles to immediate implementation of plaintiffs' plan.

The basic fallacy underlying plaintiffs' contentions, and the principal source of their plan's rigidity, lies in their definition of a desegregated school. While plaintiffs argue that any school within 15% of the system-wide racial mix is desegregated, the black-white population in the school system is so disparate that these parameters range from 56.4% to 86.4% black. Clearly, it is unreasonable to conclude that, without examining anything more than the system-wide racial composition, a school that is 55% black is a racially identifiable white school. Equally clearly, it is absurd to label a school that is 85% black as "desegregated" merely because it falls within 15% of the system-wide racial mix. To do so renders the concept of racial identifiability meaningless. While the Supreme Court has approved the use of

mathematical ratios in formulating school desegregation plans, it has approved them only as "a starting point in the process of shaping a remedy." *Swann v. Board of Education*, 402 U.S. 1, 25, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971). Moreover, the Court noted that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Board of Education*, *supra*, at 24, 91 S.Ct. at 1280.

Further evidence of the rigidity of plaintiffs' plan is found in the fact that, even after transportation, many schools are left 80% or more black. These schools are not scattered at random throughout the system but are clustered in the predominantly black center of the city. See defendant Board's Exhibit 10. Another element of rigidity is the arbitrary selection of pairings in the plaintiffs' plan. Pairings within each cluster were made solely on the basis of the racial composition of the paired schools; in making the pairings, the plaintiffs did not consider the demography of the school district. Consequently, students are often bussed past a nearby 85-100% black school and are transported to another 85-100% black school further from their homes. To do so serves no useful purpose and merely increases travel distances. After all this effort, plaintiffs' plan still leaves the majority of schools racially identifiably black.

Finally, many pairings result in pupil assignments in excess of stated school capacity. For example, the proposed enrollment of 18 junior high schools exceeds capacity. At the senior high level, the plaintiffs' plan avoids over-capacity only by assuming a correction factor for dropouts that projects 13,865 fewer blacks in grades 10 through 12. There is no justification in this record for assuming such a dropout rate for blacks. Records are not available to reflect the race of dropouts, and moreover during the 1973-1974 school year only 9,925 ninth through twelfth grade students dropped out of the system. Plaintiffs' plan further attempts to remedy the problem of over-capacity through the use of the sixth, seventh and ninth grades as "swing grades." Students in a "swing grade" could be reassigned to any school having

capacity. However, there is insufficient justification in the record to conclude that use of "swing grades" will solve the problem of over-capacity. In any event, "swing grades" create a greater burden upon the children involved and increase the amount of transportation necessary to effect plaintiffs' plan.

Our second objection to the plaintiffs' plan is that while it involves extensive bussing, it produces only negligible desegregative results. Plaintiffs' plan itself is a positive pronouncement that the disparate black-white ratio in this district precludes appreciable desegregation. After transporting 77,000 to 81,000 students, plaintiffs' plan accomplishes only an insignificant reduction in the black population of the vast majority of [1125] Detroit schools. If the white population were predominant, plaintiffs' plan could achieve desegregation. Under the practicalities at hand, however, plaintiffs' plan is unsatisfactory because it does not distinguish between bussing black students to majority black schools and majority white schools. As a consequence, it casts a heavy and unnecessary burden upon the black students, notwithstanding the fact that the remedy to be fashioned is to bestow upon them benefits that were denied in the past. Black students are being asked to travel great distances to attend another conspicuously majority black school. The purpose of plaintiffs' plan is unexplainable to the children who are bussed many miles to a school with a racial composition not much different from the composition of their neighborhood school. Plaintiffs' plan could not find the acceptance in the black community necessary to the success of a desegregation plan. Moreover, the cost of the number of busses needed to effect plaintiffs' plan would financially cripple the Detroit School System, which has been operating on a survival budget for the past few years. Although the plaintiffs suggest that only 271 busses would be needed to implement their plan, we have concluded that 840 busses is a more appropriate estimate. Further, the plaintiffs ignore the fact that the Detroit School System does not presently possess the expertise to manage, route, maintain and store such a large fleet of busses. Although the Detroit School

District has in the past bussed as many as 14,400 students to relieve overcrowding, to accommodate dangerous crossings or to transport students excessive distances, such bussing has been accomplished haphazardly through the use of chartered city transportation. Moreover, the record disclosed that the Detroit School Board has not yet formulated bus routes to accommodate a transportation plan. It is no answer that testimony was presented to the effect that certain school system personnel could devise the routes in a relatively short period of time; it is equally apparent from the record that their expertise to do so is questionable.

The establishment of such a vast transportation network would bring chaos and financial destruction to the school system, with the main result of bussing black children to majority black schools. In the final analysis, plaintiffs' plan results largely in isolating minority students in concentrated minority schools, changing only the location of the school that each student attends. Moreover, the price for this insignificant change is the severe burden of massive transportation. The Constitution does not require that such an extraordinary and costly remedy be applied where it produces only negligible desegregative results. If such an extraordinary remedy as bussing is to be employed, it should be used to bus black children to white schools, not to schools that are predominantly black. The use of such a remedy in these circumstances contains all of the seeds for resegregation, which this court has stated must be avoided at all costs.

C. The Defendant Board of Education Plan. The Detroit Board of Education, unlike the boards in other school desegregation cases, is willing to assume its constitutional duty to desegregate the Detroit School System. The President of the Board and the members of the bi-racial administrative staff have convinced the court they will willingly implement any desegregation order the court may issue.⁷ Persuasive evidence of assured cooperation from the

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The defendant Board took its first step to desegregate the school system as early as 1970 when it attempted to implement the April 7, 1970 plan. This attempt was frustrated only by acts of the Michigan Legislature.

Board and General Superintendent lies in the fact that they have promptly complied with each and every order of this court. Pursuant to an order of the court, the Board timely submitted [1126] a comprehensive desegregative plan; they did not choose to rely upon a "free choice" plan or other methods that provide part-time desegregation. In addition to many educational components and other desegregative devices, the plan includes massive bussing for permanent reassignment of students. Moreover, the attorney for the Board has persistently assured the court that the Board would willingly implement any plan the court may order. The Board has vehemently argued that since the primary responsibility for bringing forth a constitutional desegregation plan rests in the hands of a local school board [*Swann v. Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Davis v. School District of City of Pontiac, Inc.*, 443 F.2d 573, 577 (6th Cir. 1971)], other plans should not be considered for implementation by the court. We were persuaded, however, that a desegregation plan must be considered in light of all available alternatives. *Green v. County School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Notwithstanding the Board's cooperative disposition, we perceive from the evidentiary hearing and from information furnished to the court both by the Community Relations Service and our own court-appointed experts that the plan adopted by the Board is a compromise taking into account many divergent views. In January 1975, before this court's order to submit a desegregation plan, the Board created the "Office of Desegregation" to prepare a desegregation plan. This Office was staffed by many people with divergent views. The vote to approve the final plan was 9 to 4, split along racial lines. Competing factions within the Board together with their followings have held widely differing views on desegregation. Throughout the remedial hearing, there was excessive speculation concerning what the court would mandate as constitutionally required for desegregation.

As a consequence, the plan as submitted was not well documented. The plan did not inform the court of the extent to which any of the programs suggested exist in the school district at the present time. Nor did the plan present alternatives to the pairings and clusters suggested. Therefore, the court deemed it necessary to commission its experts to obtain information necessary to evaluate the suggested educational components. The court further commissioned its experts to present additional alternatives to the transportation component contained in the plan in order to evaluate the constitutionality of the plan as submitted by the Board.

Having considered the alternatives in light of all the "practicalities" at hand, we conclude that the Board's goal of desegregating by eliminating racially identifiable white schools meets constitutional standards for desegregating the Detroit School System. Moreover, we approve the Board's view that the plan must include educational components allowing for further desegregation and assuring a successful desegregative effort. However, the plan taken as a whole is not free from objection. While disavowing any attempt to adhere to fixed racial ratios for each school, the Board's plan does just that. The Board sought to determine the racial mix that provides the greatest degree of meaningful interaction between the races while at the same time providing reliable assurances of stability. Having established that schools in the 40-60% range have not been changed by demographic shifts, the Board sought to impose this ratio (which is in reality 50%-50% plus or minus 10%) on all of the schools involved in its plan.

Rigid adherence to racial percentages is not only undesirable but constitutionally infirm. Racial percentages may be used as a starting point in formulating a remedy, but it is essential that all of the critical circumstances apparent in a particular school district be afforded proper weight. *Swann v. Board of Education*, *supra*. It would be simplistic to assume that the mere adherence to racial quotas is sufficient [1127] to counter the pervasive effects of years of segregation. Because of inflexible adherence to these

percentages, some of the Board's school pairings are made without regard to the facts at hand. For example, some of the Board's school pairings include schools that are located in bi-racial residential areas and have become desegregated naturally. To bus white or black children from these schools is to employ transportation solely to accommodate a racial count. Such transportation serves no desegregative purpose and should be avoided by the Detroit Board. Where a school already satisfies the definition of a desegregated school, it should not be included in a transportation plan.

Thus, while we accept the Board's rationale of providing desegregation by eliminating the racially identifiable white schools, we must reject the Board's plan itself because, like the plaintiffs' plan, it is too rigidly structured, seeking to obtain fixed quotas through massive bussing, and fails to take account of the "practicalities." Additionally, the Board's plan is objectionable in that it fails to consider techniques for changing the racial compositions of schools that do not involve transportation. Borderline schools are paired in the Board's plan even where re-zoning across regional lines might suffice to produce desegregation without transportation. Re-zoning is preferable to bussing because it reduces transportation, permits walk-in schools and serves bi-racial neighborhoods. Rather than pair schools and transport students, the Board should first exhaust the possibility of restructuring attendance zones. Where capacity permits, one-way bussing might also reduce the amount of transportation needed to desegregate.

The Board's plan is further objectionable in that it needlessly changes the grade structures of schools involved in the plan. It seems to us that traditional grade structures such as K-5, 6-8 and 9-12, which are preferable because irregular grade structures hamper school curriculum offerings, can be achieved.

Moreover, we are not convinced that the choice of schools involved in the pairings was not influenced by political considerations unrelated to the effect of the individual

pairing on desegregation. In order to detail our concern, we must take account of the structure of the Detroit School System. The decentralized system was conceived to afford an opportunity for the community to exercise greater control over its school system; however, decentralization as practiced in Detroit has not truly accomplished this goal.

Pursuant to Act 48 of the Michigan Public Acts of 1970 (Mich. Comp. Laws 388.171 *et seq.*), the Detroit School System is divided into eight regions, each of which is permitted a vast amount of autonomy. Each region has its own board of education selected by the people within the region. The board member receiving the most votes not only is elected chairman of the regional board but also is a member of the central Board of Education. Thus, eight of the thirteen seats on the Central Board are occupied by regional chairmen. It is obvious that through political maneuvering, the eight regional chairmen can combine to promote regional interests at the expense of the over-all interests of the school system. Thus, desegregation could be hampered through the political maneuvering of the regional board members combining to promote merely regional interests. Since the regional members constitute a majority of the Board, there is no way to ensure that the interests of the entire school system can be advanced.

We are unable to perceive from the Act a legislative intent to create the structure that in fact developed in the Detroit Schools. Rather than decentralizing to disperse bureaucratic authority, the Detroit Schools have developed another completely bureaucratized political institution: the regional boards of education. As originally conceived, the [1128] legislature envisioned "community centered schools", not separate independent bureaucracies substituting for a larger one. Moreover, the present structure of the system frustrates the achievement of educational goals common to all schools throughout the system. The system is no longer a top-to-bottom command educational organization. What has impressed this court as a competent, dedicated staff at the top lacks the means of assuring that its orders and programs

will be executed at the bottom. Any programs designed to advance the interests of the entire system can be frustrated by any one of the eight separate regions. An edict from the top can be diluted so that by the time it reaches the lower level it has little or no impact.

Moreover, the testimony has indicated that the lines of demarcation between the central and regional boards have become obscured. The eight regional chairman acting in conjunction can effectively strip the Central Board of all of its power. Thus, the Central Board appears to have been relegated to the role of advise and consent, and it is apparent from the "Guidelines for Decentralization" (Defendant Board's Exhibit 4) that the Central Board must consent more frequently than it advises. Thus, Detroit voters have been bequeathed no more than a vote for a regional board in exchange for the Central Board. Nothing further toward achieving community control has developed in five years of decentralization. The political institution that has developed has cast a heavier financial burden upon the people of Detroit without resulting in a greater voice for the community in the operation of the school system. Moreover, the structure has not been able to develop or hold public interest in the schools. Thus, the system now proposes to pay for the community relations and participation that the legislature thought would be engendered by the Act itself. The legislature may wish to take a fresh look at the structure that has developed in order to bring it more in line with the stated goals of decentralization.

It is conceivable that the regions themselves might have made demands concerning the very pairings contained in the plan; by soliciting the support of other regions, each region could effectively veto the inclusion of any given school in the plan. Evidence of such political accommodation might exist in some of the pairings chosen for the Board's plan. Some schools that fall within the Board's racial parameters are nevertheless paired to reduce their percentage of black students. For example, Hanneman School is reduced from 58% to 48% black, Cary is reduced from 58% to 44% black, McMillan is reduced from 52% to 41% black and Edison is

reduced from 65% to 51% black. Transportation for the purpose of reducing the percentage of black students in already desegregated schools is clearly unnecessary and is inconsistent with the Board's avowed purpose of eliminating racially identifiable white schools. While the court cannot conclude that the inclusion of such schools in the Board's plan necessarily resulted from accommodation of regional interests for political motives, neither can the court rule out such a possibility.

The Board's plan also includes a number of educational components intended to facilitate desegregation. Some are unrelated to desegregation and have been inserted with the hope that they could be implemented by court order. Moreover, the magnitude and the importance of some components are overly exaggerated. In its entirety, the Board plan requires an expenditure of more than \$60 million. However, many of the proposed components have merit. Our remedy includes many of the Board's suggested components and adds others that we feel are constitutionally mandated.

D. Plaintiffs' Objections to the Board's Plan. The plaintiffs' principle complaint is that after application of the Detroit Board's plan, the racial composition of student enrollment in Regions [1129] I, V and VIII, which comprise the inner core of the city, remains virtually unchanged at 90% to 95% black. Plaintiffs complain that the racial composition of student enrollment in 87 elementary schools, 18 junior high schools and 8 high schools in those three regions remains unchanged. Considering the practicalities at hand, we do not find that this objection presents any constitutional impediment to the Board's plan. If the number of all-black or predominantly black schools that remain untouched appears to be large it must be remembered that the school district itself is large; it is the fifth largest in the country and contains a total of 326 schools spread over a 136 square mile area in which whites are outnumbered by blacks.

Plaintiffs refuse to acknowledge that the racial composition of these three regions precludes their inclusion in a

desegregation plan. In Region V, for example, there are 31,354 students of whom (excluding the Spanish surnamed) only 989 (3.1%) are white. In Region VIII, there are 29,725 students of whom (excluding Spanish surnamed) only 1,329 (4.5%) are white. In Region I, there are 24,907 students of whom (excluding Spanish surnamed) only 2,049 (8.2%) are white. Clearly, it would be futile to attempt desegregation within the boundaries of these regions; thus, a desegregation plan including these three regions would have to cross regional boundaries. But to include these regions in the Board's plan would bring about the same result that pertains after application of the plaintiffs' own plan. The plaintiffs' plan itself is sufficient proof that any attempt to include these regions produces only negligible results. Application of plaintiffs' plan "would make the Detroit school system more identifiably Black, and leave many of its schools 75 to 90 per cent Black." (Findings of Fact — March 28, 1972, 484 F.2d 215, 243-44 (1973.))⁸

That inclusion of these three regions in a desegregation plan would produce only negligible desegregative results is inevitable because even excluding Regions I, V and VIII there are only 63,446 white students as compared to 103,007 black students. To attempt to disperse those white students throughout the eight regions, including the three overwhelmingly black regions, would produce such negligible desegregative benefits that the extraordinary remedy of such cross-regional bussing would be unwarranted. To do so would only serve to lessen the little community control blacks now enjoy in those regions and, therefore, injure the very class the remedy is intended to benefit. In the face of these "practicalities" there is no constitutional objection to leaving a number of one-race or predominantly one-race schools. *Swann v. Board of Education, supra*; *Quality Ed. for All Child., Inc. v. School Bd., etc. Ill.*, 385 F.Supp. 803, 823-24 (D.C.Ill.1974); *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883 (5th Cir. 1970);

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The district court's ruling on the Detroit-only desegregation plan is set out in full by the Court of Appeals, *id.*, at 242-245, and is not otherwise officially reported.

Mannings v. Board of Pub. Instruct. of Hillsborough Co., Fla., 427 F.2d 874 (5th Cir., 1970).

Plaintiffs next contend that the Board's decision to leave a number of one-race or predominantly one-race schools in the inner-city regions and the Board's persistence in achieving a "stable" racial mix are based plainly and simply upon the Detroit Board's fear of "white flight." They argue that the Board's decision to allow certain untouched schools to operate under capacity while certain other schools included in the plan are over-utilized is based upon the fear that middle class white families will flee the school district, the consideration of which is constitutionally impermissible. It is true that "white flight", like the degree of community resistance to a desegregation order, is not one of the "practicalities" to be considered in formulating a just, feasible [1130] and workable plan. The law must be obeyed notwithstanding these considerations. The Supreme Court has stated on several occasions that white flight is not justification for limiting the degree of desegregation; nor will it justify a school board's refusal to desegregate. *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972); *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972). Our own and other circuits have similarly ruled. *Higgins v. Board of Education of City of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974); *United States v. Board of Sch. Com'rs, Indianapolis, Ind.*, 503 F.2d 68 (7th Cir. 1974). To hold otherwise would be tantamount to depriving school children of their constitutional rights in favor of those who prefer segregation. Moreover, consideration of white flight would be senseless in view of available statistical data contained in the United States Census Bureau Statistics demonstrating that the exodus from the City of Detroit occurred in the decade preceding the filing of this litigation and has subsided since that date.⁹ In any event, the evidence presented does

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In addition, it would be unwise for the court to consider white flight in view of the fact that there is an abundance of literature acknowledging that white flight is perceived more as a function of class than race or resistance to desegregative orders. See Nancy St. John, *School Desegregation, Outcomes for Children*, John Wiley & Sons, New York.

not support the conclusion that the Detroit Board was responsive to the fear of white flight in the formulation of its desegregation plan.

On the other hand, it is unreasonable to expect the Central Board to administer a large school system in a vacuum. It is one thing to consider white flight to avoid or limit desegregation; it is quite another thing to consider the practical problems with which a board of education is faced in attempting to achieve an acceptable racial balance without aggravating conditions that produce a self-defeating exodus of the middle class white and black. *Higgins v. Board of Education of City of Grand Rapids, supra*. Detroit's citizens are faced with a tax burden greater than any other city in the State of Michigan. The effects of the community overburden in the district, caused by the degree of taxing authority exercised by the City of Detroit, are not ameliorated to the full extent provided by law because the program is not fully funded by the State. The Board operates in a city that has left little room for taxation to operate the school system. The community at large has already indicated its lack of support for propositions designed to increase the Board's millage by rejecting such proposals at the polls eight times. Not only is it constitutionally permissible to take these "practicalities at hand" into account in forming a desegregation plan, but it would be irresponsible for this court not to consider such practicalities where the very survival of an already bankrupt school system is at stake. To act irresponsibly would deny all school children the right to quality education.

The Board was justified in considering the "phenomenon of resegregation" in devising its plan for desegregation. Well-intentioned middle class blacks and whites will prefer private schools and suburban schools to the prospect of remaining in a school district becoming incapable of delivering basic educational services. A white and middle class black exodus will assuredly result if, as a result of desegregation orders, the school district became chaotic and hostile to intellectual achievement. It was these "practicalities" that were considered by the Board in attempting to

achieve a degree of racial stability, and we find that it is constitutionally permissible to take such practicalities into account. As we have previously said, the plaintiffs' plan itself sufficiently demonstrates the justification for allowing one-race schools to operate in Detroit. [1131] The alternative is to make each and every school in the district identifiably black.

Finally, plaintiffs have presented much evidence establishing that black children in segregated schools suffer adverse educational and psychological damage. This is a principle that has already been acknowledged by the courts, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and indeed this principle itself justifies the imposition of a desegregation order. However, the parties differ on the definition of desegregation. We have demonstrated the fallacy underlying plaintiffs' definition. As a result of the application of their plan, all of the schools throughout the district become racially identifiably black. Thus, psychological damage is more likely to occur as a result of plaintiffs' plan than as a result of the plan the court adopts. There are measures for assuring a perception that schools are desegregated other than the presence of white students: equal facilities, integrated faculties and meaningful guarantees that every student is welcome in any school notwithstanding race. Oftentimes, as plaintiffs' plan demonstrates, the use of fixed quotas will not give assurances of desegregation but instead may tend to extend segregation throughout the entire system. In a district where the racial percentages are as disparate as in this district, the existence of predominantly black schools is not demeaning to blacks. A plan that does no more than attempt to achieve the system-wide ratio in each and every school may result in transporting children merely to scatter a few white students here and there among the black students who are in the majority. To seek this result assumes that there is some divine grace in being white. The notion that the mere dispersing of whites here and there is educationally beneficial to black students is demeaning. An appropriate desegregation plan recognizes all the practicalities with which a

particular school district is faced. A desegregation plan must be based upon constitutional and equitable rights of individual students and upon the educational goals that desegregation seeks to attain.

E. General Conclusions Pertaining to Both Plans.

Many definitions of desegregation have been advanced by courts, educators and social scientists. Some have said that not more than 90% may be of any one race. Others hold that not more than 50% may be of any one minority group. Still others insist on fixed racial quotas that reflect ethnic proportions prevailing in a given area such as a state, county or local community. Some argue for precise ratios while others find that a specified tolerance, expressed as an arbitrary percentage that does not relate to racial compositions but rather is devised to accommodate an approach to planned desegregation, is necessary. If school desegregation does not occur naturally through bi-racial neighborhoods, it must be planned. Limitations may be imposed by the desegregated area. For example, the black proportion of the population can be so great that racial balance will inevitably result in majority black schools. In such an area, only two alternatives are available: The desegregation area must be enlarged or flexibility must be permitted in defining a desegregated setting.

While there are many differences between the plans proposed by the plaintiffs and the defendant Board, both plans share the common defect of relying on fixed racial percentages. Both plans attempt to conform the racial percentage of all of the schools included therein to a predetermined range. We have indicated that the Constitution does not require such an inflexible approach to desegregation. Both plans fail to take account of the practicalities at hand, such as demographic trends, financial limitations, existing grade structures and naturally integrated neighborhoods. Both plans rely exclusively on transportation to reassign pupils without exploring alternative techniques. [1132] In the final analysis, it is because both plans are inattentive to such practicalities that both plans must be

rejected. Because both plans ignore the "practicalities," both plans require massive transportation that is, at least to some degree, unnecessary to achieve desegregation.

Plaintiffs contend that there is only one Constitution, equally applicable to all school districts. Thus, they argue that since we would not hesitate to apply their parameters to a 72.5% white school district, we should equally apply them to a 72.5% black school district. We think such an argument in the context of this school district is superficial. The argument ignores the fact that the "practicalities of the situation", which the Constitution requires that we take into account, would be different if the school district were 72.5% white. There would not be, for example, irresponsible bussing of black children to black identifiable schools. Thus, we are required to bear in mind that plaintiffs represent a class of blacks, and that the bussing of black students to identifiably black schools places a burden on the blacks, the very class whom the remedy is supposed to benefit, far in excess of the benefit resulting therefrom. Moreover, because plaintiffs represent a class of blacks and not a class of whites, desegregation requires only that plaintiffs themselves be represented in significant proportions throughout the school district through the elimination of identifiably white schools. That a unitary school system in Detroit would not require the elimination of black identifiable schools as well is obvious from the plaintiffs' argument: If the system were 72.5% white, dispersing the blacks throughout the entire system would not eliminate white identifiable schools.

Moreover, that elimination of white identifiable schools is sufficient for desegregation in Detroit is apparent from consideration of the evil desegregation is designed to correct. As plaintiffs have argued throughout this litigation, the evil of segregation lies in the devastating psychological impact upon black children of the knowledge that they are being excluded from white schools. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way

unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). However, when blacks are represented in all schools throughout the system, i.e., when white identifiable schools are eliminated, this psychological effect no longer exists. There no longer is a denial of their right to equal protection when there are no schools from which they are excluded.

We have concluded that the rationale behind the Board's proposed plan promises meaningful disestablishment of the state-imposed segregation. We perceive it to be our obligation to assess the effectiveness of the Board's plan in the light of the circumstances present and options available. Accordingly, the remedy we propose will set forth constitutional guidelines. *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

From the above, it is apparent that a fresh start is required to dismantle the remaining vestiges of a dual school system. We are prepared now to furnish the Board with guidelines solely devoted to this purpose and to assure quality education for all children in the system.

V. REMEDIAL GUIDELINES

The remedial guidelines that we detail herein define constitutional requirements for dismantling the dual school system found to exist in Detroit. In fashioning these guidelines, we have carefully considered the "practicalities of the situation" existing in this district. The guidelines are characterized by the flexibility needed to accommodate conflicting [1133] community concerns. We have not, however, allowed flexibility to substitute for effectiveness, and it is our belief that these guidelines will achieve quality desegregated education for all children.

Recognizing that the interest of the community as a whole is a legitimate concern of the district court in formulating a

desegregation remedy, the Supreme Court has furnished the basic guideline:

"Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971).

Because a desegregation plan is comparable to other equitable remedies, these guidelines are not premised upon a supposed inflexible constitutional standard that each school must have a predetermined racial composition. *Swann v. Board of Education*, 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Accordingly, there may be variances in the racial mix between regions and between schools within a region. The guidelines recognize that inflexible parameters are artificial and arbitrary and that their application to the Detroit schools would disrupt and bankrupt the entire system. Thus, rather than focus on each school in the system, the guidelines balance the practicalities that affect the system as a whole. Reflecting such practicalities, the guidelines recognize the impossibility of eliminating all racially identifiable black schools.

Further, consistent with general equitable principles, the guidelines balance the burden imposed against the desegregative results achieved. They recognize that transporting children is an extraordinary remedy to be employed only when appreciable results may be accomplished thereby, and then only when other alternatives have been exhausted. Therefore, our guidelines do not require transporting black children to predominantly black schools. Nor do they require transporting black or white children from naturally desegregated attendance areas. The guidelines acknowledge that the goal of desegregating this school system

requires the elimination of racially identifiable white schools. Therefore, the guidelines require that a representative number of black students be assigned to every school in the district. However, taking account of the wide variance in racial composition existing throughout this school district, these guidelines do not attempt to eliminate racially identifiable white schools by imposing fixed ratios. We suggest a 50-50 racial mix only as a starting point; we permit variations that take into account the desegregative results likely to be achieved.

Further, the guidelines recognize that, in a unitary school system, each school need not reflect the system-wide racial ratio. The guidelines consider criteria for measuring a unitary system other than ratios, such as faculty assignments, staff assignments, extra-curricular activities, equality of facilities and assignment patterns. Moreover, the central theme of the guidelines is that equal educational opportunities must be available for all children. An equitable, workable and feasible plan must do more than just reassign students. Thus, the guidelines provide for educational components designed both to equalize the delivery of educational services at all schools and to restore quality education, which has deteriorated due to past acts of discrimination. Still other guidelines outline components designed to assure successful implementation of the court order by meeting head-on the special problems accompanying desegregation.

From these guidelines a plan should evolve that creates a unitary school system in which every school in the community will be open to all students, [1134] regardless of color. At the same time, the guidelines do not neglect those considerations that would make it difficult for the system to maintain the financial support of the community. Inherent in these guidelines is the recognition that a desegregation case requires a search for a solution that is equitable and fair to all. Only in this way can stability be assured and a sound educational system be preserved for the entire community.

1. Guidelines for Revision of the Board Plan - Student Transportation

The guidelines that follow will aid the Board in producing a plan that eliminates the remaining racially identifiable white schools in the district by reassigning black students, who are in the majority, to schools throughout the city. It has been emphasized, however, that these guidelines do not sanction adherence to fixed racial ratios; they permit variation based on the constitutionally required consideration of the "practicalities of the situation." *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971). The guidelines recognize that variation in racial ratios is a function of many factors and does not necessarily diminish the degree of desegregation.

From these guidelines, a plan should evolve that effectively desegregates, brings into equitable balance the objectives sought and the results to be achieved,¹⁰ and exhausts all alternatives before settling on the best method to achieve its results. Such guidelines follow:

(a) Where possible, desegregation should be accomplished by re-zoning attendance areas in lieu of transporting children.¹¹ Before using transportation, the Board must establish that all re-zoning methods have been exhausted. The re-zoning should be attempted only after all the requirements of the court's order are considered. The Board is reminded that when re-zoning efforts are attempted,

10.

In *Swann v. Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971) the district courts are reminded that a desegregation case is no different than an ordinary case in equity. The court stated: "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."

11.

Although the plaintiffs attempted to desegregate by rezoning attendance areas, it is this court's belief that their failure to do so was a result of their definition of a desegregated school. There is no evidence in the record that, given this court's more flexible approach to desegregation, rezoning attendance areas will not be a useful desegregative tool.

regional lines need not be respected; when the choice is between preserving regional lines and bussing, regional lines must give way. Re-zoning will reduce the amount of transportation required to desegregate and will permit the use of walk-in schools in integrated neighborhoods.

(b) The revised transportation plan should avoid bussing black children to predominantly black schools. A school that is 55% or more black is a predominantly black school. Neither black nor white children should be bussed to schools that are already desegregated according to these guidelines; transportation under such circumstances produces an inequitable burden upon the children affected. Where only a small change in enrollment is needed to bring a school within the 30% to 55% range, the use of satellite zones should be explored. We trust the Board is assembling the data base suggested by the court to create computer print-outs showing the racial composition of neighborhoods by grids. When these data are compiled the Board will be able to avoid transportation under the conditions described above.

The Detroit School System now transports 14,400 students by chartered bus to relieve overcrowding or to overcome dangerous crossings and long distances. Attempts should be made to [1135] accommodate these children at neighborhood schools by re-zoning where the neighborhood school is an equal facility. However, if such transportation is necessary to desegregate the receiving school, it should continue. In the event that it is essential to bus these students they should be transported to aid desegregation only in accordance with these guidelines.

(c) Elementary schools should not be paired when one or both of the schools already satisfies the court's definition of a desegregated school.¹² Where desegregation cannot be

12.

For example, in the Southwest Constellation, the Carrie School is paired although it is already 58% black. In the Chadsey Constellation, the Hanneman School is 58% black. Moreover, the Board plan sometimes precludes students within walking distance of a school from going to that school. For example, the Burt Elementary attendance zone is in the Redford area, yet Burt students have been assigned to Cooley rather than Redford. Similarly, students in the Schultz attendance zone should go to Mumford, yet they are assigned to Redford.

accomplished by re-zoning or the use of satellite schools, the Board may pair appropriate schools. In making the pairings the Board should, wherever possible, pair an identifiably white school with the nearest school exceeding 55% black enrollment. In this way, the distances involved in transportation will be kept to a minimum.

(d) The Board should seek to maintain uniform grade structures, consisting of K-5, 6-8 and 9-12. Since an excessive variety of grade structures makes it difficult to provide school offerings consistent with quality education, consistent grade structures are preferable. Irregular grade structures would make it difficult to incorporate the components contained in the court's order and would make the plan more difficult to monitor.

(e) *Desegregation and Integration Guide Translated Into Percentages and Racial Ratios.* This guideline is derived from assessing the practicalities confronting the Detroit School System, such as a rapidly increasing black student population and meager financial resources.¹³ Schools with a resident population in the service area of between 30% and 55% black shall be considered desegregated. If a school is within this range, no change in pupil assignment is necessary. Further pupils need not be reassigned merely because a school's racial composition exceeds 55% black; the "practicalities" may dictate leaving the school alone. However, in no event should a school remain more than 70% white.

(f) *Elementary Schools.* Consistent with the foregoing, elementary schools should be desegregated by re-zoning if possible. An elementary school with a resident population in

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Another factor that the Board may wish to consider in making its pairings is the "Weighted Poverty Index" of each school, which varies in Detroit from 0.18 to well over 40. The socio-economic mix, as measured by the poverty index, is a significant factor and should be considered along with the racial mix. As far as possible, the Board should strive to have no school with a poverty index greater than 15.

the service area of between 30-50% black has achieved a permissible degree of desegregation. In those schools where a small change in enrollment will bring the school within these parameters, attempts should be made to do so by using a satellite zone. In selecting satellite zones, an appropriate group of children to select would be a group residing in an elementary service area that includes a middle school to which the children can walk. Transporting a child for his elementary school career would be more equitable if the child could later walk to a middle school. Although it may be impossible to divide the burden involved in a desegregation plan equally, the Board must avoid gross inequities. Particularly, there should not be great variations in the transportation burden falling on adjacent areas because such variations will influence residential patterns. The [1136] Board should further avoid bussing children out of an integrated service area.

Since K-5 grade structures will result in excessive school capacity, the Board can take antiquated school buildings out of service. These closings and subsequent pupil reassignments are intended to equalize facilities and to further desegregation both by adjusting racial composition and by facilitating a non-discriminatory construction program. The Board may also consider closing some schools temporarily if further desegregation would result.

Elementary schools that cannot be desegregated by re-zoning or by satellite zones shall be paired. If possible, the grade structure at each paired school shall remain K-5 provided the paired schools have approximately equal enrollments. Pairings need not be made one on one; for example, a 900-pupil school can be paired with a 300 and 600-pupil school. If maintaining the grade structure K-5 is not possible, the changing of grade structures will be permitted. Enrollments in schools can be adjusted by redrawing the service area zone lines.

The paired schools will be desegregated by exchanging pupils between the pairs. One-half of the pupils in each grade

from each school will be bussed to the school or schools in the pair. The classes will be rotated annually or semi-annually so that each child will attend his neighborhood school at least every other year. Teachers also may be rotated so they can continue to teach the same group of students. When the pairings are completed, students should enter integrated classrooms.

(g) *Middle Schools.* Middle schools will serve Grades 6-8. To provide for the maximum degree of desegregation, there will be two types of middle schools: "zoned middle schools" and "open enrollment middle schools." The open enrollment schools will function similarly to current magnet middle schools, but will have a controlled racial mix generally 55-70% black. The racial composition may exceed these parameters where practicalities require, but in no event should a school exceed 50% white. The zoned middle schools need not have zones that correspond to elementary service boundaries. In developing the zones, the Board shall provide walk-in schools wherever possible. Although a zoned middle school that is 30-55% black shall be considered desegregated, the Board's target should be 50% black enrollment at this level. In developing zones for middle schools, the Board may consider satellite zones but such zones should be avoided where it can be shown that they would create housing instability resulting from differing treatment of adjacent neighborhoods.

Generally, no child should be bussed for more than five of his first eight years. Any child that is bussed for desegregation at the elementary level for five years should not be bussed for desegregation to a middle school. If the Board finds compliance with this guideline impossible, the Board shall report the exceptions by numbers, race and location.

(h) *Summary.* We believe these guidelines provide sufficient latitude to accommodate the practicalities needed to be considered to preserve a financially crippled school system. The suggested parameters permit the Board to

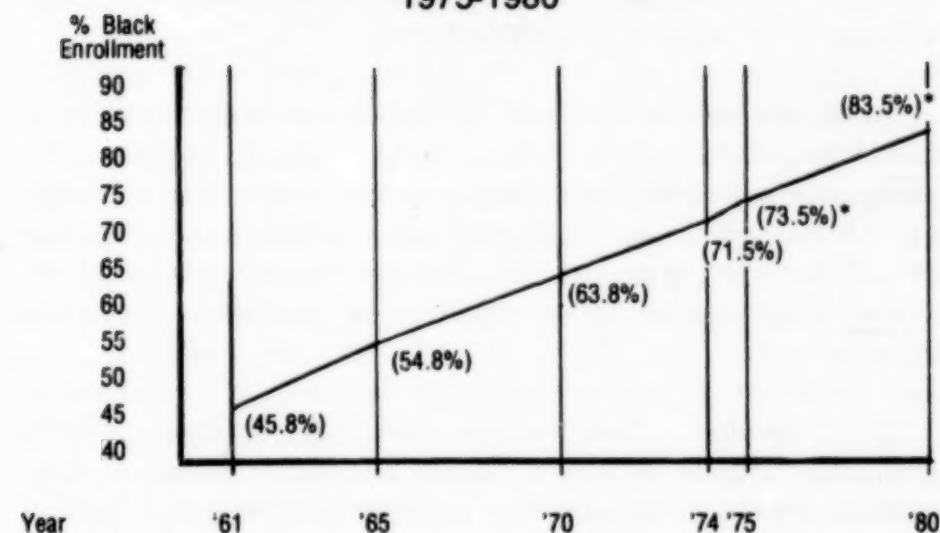
consider inevitable demographic trends and allow the formation of long-range plans to deliver quality education and maintain financial independence. (See chart following — Demographic Projections 1975-1980.) This kind of stability, which assures the durability and longevity of court orders requiring desegregation now and hereafter, is constitutionally compatible with the desegregative goals the Board must seek.

Moreover, these parameters recognize an equitable constitutional balancing of private and public needs. Students, particularly older students, must be able to perceive that the inconvenience of attending a less accessible [1137] school serves a noble goal, that a desegregation plan will enhance the quality of education and that desegregation is neither disruptive nor destructive.

In sum, the plan will have the following characteristics:

(a) Schools as presently constituted, either by resident enrollment, busing to relieve overcrowding or busing resulting from school closings, that result in a 30%-55% black enrollment shall be considered desegregated.

DEMOGRAPHIC PROJECTIONS
1975-1980



*Projected

[1138] (b) In providing further desegregation, a 50-50 enrollment may be used as a starting point for reassigning students, but no school shall be less than 30% black.

(c) Pairing shall involve only schools with enrollments under 30% or over 55% black. To minimize travel distances, pairings shall be made between each white school and the nearest predominantly black school.

(d) As far as possible, the schools will maintain a uniform grade structure of K-5, 6-8 and 9-12.

(e) Elementary schools will enroll children in grades K-5. Classrooms or half classrooms will be exchanged between the paired schools on a rotating basis, permitting each child to attend his home school at least every other year. Not all elementary school children will attend paired schools; some will reside in integrated neighborhoods and as many elementary schools as possible will be desegregated by redesigning attendance zones. Where possible, satellite zones rather than two-way busing will be used. Where busing is needed, bus trips will be as short as possible. The change in grade structure from K-6 to K-5 will generate excess elementary school facilities, enabling a number of antiquated schools to be taken out of service.

(f) Middle schools, 6-8, will be of two types: "open enrollment" and "zoned schools." In keeping with these guidelines, open enrollment schools will have racially controlled enrollments. Where the practicalities permit, middle schools will be 55-70% black, and no middle school will enroll less than 50% black.

(g) The plan will involve the creation of vocational centers.¹⁴ Two high schools may be converted into vocational centers; students currently enrolled in these schools will be reassigned to other nearby schools, thus

14.

See section on Vocational Education, *infra*.

aiding desegregation. Although the vocational centers will be open to all students city-wide, their racial compositions will be controlled. Initially, no high school or vocational center shall enroll less than 40% minority. Thereafter, enrollments will be controlled to conform to these guidelines. Curriculum studies will be necessary to adjust the present city-wide schools such as the Aero Mechanics High School.

2. Reading and Communication Skills

The development of proficient reading skills is the most essential educational service a school system can deliver. Where a school lacks a successful reading program, a child cannot be assured academic success or a beneficial school experience. Students who have not achieved adequate reading and communication skills cannot succeed in the main-stream of society. They are limited in their vocational selection; their handicap necessarily precludes them from entering the professional world. While in school, they cannot be fairly tested.

There is no educational component more directly associated with the process of desegregation than reading. Statistical data establish that minority youngsters lag significantly behind their white counterparts in reading skills, which in turn affects the ability of minority students to follow written instructions, succeed on aptitude tests, pass entrance examinations for colleges and universities and compete in the world of arts, sciences, occupations and skills. Moreover, when such conditions persist, there is a direct effect upon the school environment. Students become disciplinary problems when in reality their problem is directly associated with an inability to conceptualize due to a lack of proper reading and communication skills. As a consequence, teachers and staff assume that such minority students are uneducable, thus further deteriorating the school environment for these students. To eradicate the effects of past discrimination, a remedial reading program [1139] should be instituted immediately to correct the deficiencies of those midway in their educational experience.

The court considers this component deserving of top priority in a school district undergoing desegregation. Accordingly, the court's order will direct that the development of such a program in the desegregative process be the direct responsibility of the General Superintendent and a committee to be selected by him.¹⁵ We trust that such a committee will include some of the expertise available in the Michigan community. Detroit is fortunate in having a number of people expert in developing learning techniques for reading who are at the same time devoted to Detroit's educational system. This court hopes that the General Superintendent will personally pioneer this effort to achieve excellence unequaled by any other school system.

3. In-Service Training

A comprehensive in-service training program is essential to a system undergoing desegregation. A conversion to a unitary system cannot be successful absent an in-service training program for all teachers and staff. All participants in the desegregation process must be prepared to deal with new experiences that inevitably arise. The order that follows pursuant to these guidelines requires in-service training in such fields as teacher expectations, human relations, minority culture, testing, the student code of conduct and the administration of discipline in a desegregated system for all school personnel. The program shall also include an explanation of the purpose and nature of each component in the desegregation order. It is known that teachers' attitudes toward students are affected by desegregation. These attitudes play a critical part in the atmosphere of a school and affect the pulse of the school system. Teachers, both white and black, often have unhealthy expectations of the ability and worth of students of the opposite race. Moreover,

15. We direct the General Superintendent's attention to the Public Report of the Education Task Force, as revised March 5, 1975. The recommendations with respect to development of a reading program and suggestions contained therein are endorsed herein.

it is known that teachers' expectations vary with socio-economic variations among students. These expectations must, through training, be re-oriented to ensure that academic achievement of black students in the desegregation process is not impeded. A comprehensive in-service training program will ensure that all students are treated equally in the educational process. The goal of a sound in-service training program should be the awareness that there are neither black students nor white students, just students.

The Detroit Board of Education is advised that Wayne State University and other universities have offered their cooperation in this desegregation effort. Accordingly, the Board shall request the Wayne State University College of Education to assist in developing a comprehensive program to provide in-service training. The court is of the view that the program outlined in the Board plan will fulfill the expectations of the court order. The Detroit Board is further directed to seek assistance and funding from the Title IV Center at the University of Michigan and, upon issuance of the court order, to submit further proposals for assistance to the United States Office Of Education for Emergency School Aid Act (ESAA) funds. Moreover, the defendant Superintendent of Public Instruction is directed to seek financial and personnel assistance from other state institutions. The in-service training program as instituted should be on-going, include all schools in the system and be open to all personnel employed by the Detroit Board of Education. Such in-service training sessions shall be conducted during the school year and just prior to the opening of school. The Board should discontinue [1140] payment to teachers for attendance at such sessions on Saturdays.

4. Vocational Education - Technical High Schools

Open association with other students of varying races, cultures and religions forms the most basic ingredient in a student's learning experience. Children living, learning and playing together convert a building into a human institution with a pulse and personality. Students, parents and teachers

come together to live, learn and work in an atmosphere imbued with human warmth. In this atmosphere, the attachments born of a classroom become the most durable. A segregated system deprives students of this interpersonal learning experience and injures them in a lasting way. The resulting isolation destroys the atmosphere and pulse of a school system and, eventually, the quality of the educational services rendered. Minority students in segregated settings often lose interest in education, eventually believing they have no stake in the system. This inevitable result is reflected both in the school system's dropout rate and in the number of students who graduate without being able to read or spell. Thus, a segregated school system fails to provide relevant and diversified programs to meet the needs of the students it serves.

Vocational education is given high priority in these guidelines because while it is able to compensate for past discrimination, at the same time it serves as an effective tool for desegregation. It can both offer an immediate desegregated setting and help re-establish quality education. Vocational education is easily assimilated into the Magnet Program now in effect in this system and offers attractions that exceed those currently available. It can serve to combat the dropout rate and prepare students for specific work situations in the business world. Finally, it will equip minority students with the knowledge and skills essential to enter occupational trades often foreclosed to them.

Accordingly, the court's order will require that the defendants Detroit Board and State Board of Education create vocational centers devoted to in-depth occupational preparation in the construction trades, transportation and health services. In addition, the order will require that the defendants Detroit Board and State Board of Education create two new technical high schools in which business education will be the central part of the curriculum. It shall be the responsibility of the School Board and the State Board of Education to fulfill their obligations under the Constitution and state law to ascertain that the four vocational centers

created are of the highest quality. Moreover, each of these vocational centers shall include a grade 13 providing advanced offerings both for those students presently enrolled and for other students who have left the system within the past three years.

As an immediate desegregative effort, the Detroit Board of Education and the State Board of Education are directed to create two such vocational centers as promptly as circumstances permit. In order to eliminate the need for new construction, two existing facilities may be selected; the court's experts suggested that Cooley and Kettering be utilized as vocational centers. Accordingly, the Detroit Board shall immediately submit a plan conforming to the following guidelines:

(a) The plan shall indicate where students presently assigned to Cooley and Kettering will be reassigned and the effect of such reassignment upon desegregation. The plan should minimize the inconvenience to students who would otherwise enroll at these schools. The Board may wish to consider the feasibility of not enrolling students at either Cooley or Kettering in the September, 1975 school term.

(b) The Board shall submit maps depicting the new high school zones that result from the elimination of the Cooley and Kettering attendance areas.

[1141] (c) The plan shall contain detailed curricula for Cooley and Kettering High Schools.

(d) The vocational centers at Cooley and Kettering shall be city-wide schools and shall have a racial mix that, considering the practicalities at hand, approaches a ratio of 60% black and 40% white.

(e) The Detroit Board and the State Board should confer immediately and submit a plan to the court not later than three weeks from the issuance of the court's

order. The plan should include a time and cost schedule for modifications necessary to convert Cooley and Kettering High Schools into vocational centers and should also include proposals for two additional centers. The parties are directed to ensure that these vocational centers are equal in quality to the best vocational schools in the country.

As an immediate desegregative effort the Detroit Board shall, as promptly as circumstances permit, undertake to create two additional technical high schools, which are to be modeled after the program at Cass Technical High School. The Board shall select sites for such technical high schools that afford the maximum degree of desegregation. In keeping with this desegregative effort, the Detroit Board of Education and the General Superintendent shall commission a study of the curricula to be established at the two technical high schools. The study should determine what duplications might exist between offerings at the technical high schools and the vocational centers or the academic high schools.¹⁶ After formulation of the joint plan for creation of the vocational centers, the State Board of Education shall submit such plan for review and evaluation to an appropriate evaluation panel such as a vocational education expert at an institution of higher learning. When the joint plan is submitted, it shall include the evaluation made by such expert and modifications suggested as a result of such evaluation.

Upon recommendation of the court-appointed experts, the order of the court will direct, as a further desegregative effort, that the Detroit Board of Education undertake a study

16.

The Board's plan as submitted does not distinguish clearly between courses to be offered at the vocational centers and the technical high schools. The study should identify the offering of courses duplicating those at other high schools; duplication might detract from the magnet programs instituted at the two new technical high schools. The study should further determine the effect of duplication of courses at different locations upon desegregation and the quality of education.

evaluating an alternate form of education following the Parkway Concept. The court's experts have suggested that Northern High School could be used for such a project. Accordingly, the defendant School Board is directed to submit plans for such a program, including an evaluation of its feasibility and the contribution that such a program might make to desegregation. The Board shall further seek and obtain a professional evaluation of such concept from outside the School Board's present administrative staff. If the evaluation is favorable, the Board shall thereafter submit plans and costs schedules for implementation of such concept.

It has been brought to the attention of the court that the Detroit School Board is presently ineligible for full funding from the state to operate the proposed vocational education programs because certain provisions of the contract between the Detroit School Board and the Detroit Federation of Teachers, which require that a school day not exceed 7¼ hours and impose a maximum of 25 teaching periods per week, conflict with regulations promulgated by the State Board of Education. The court, however, has stated that vocational education programs must be instituted pursuant to a desegregation mandate. Accordingly, the parties shall appear in court for a hearing and subsequent order that will set aside either the State [1142] Board of Education regulations or the contractual provisions. The date for the hearing shall be set upon motion to be filed by the Detroit Board of Education.

5. Testing

Of great importance to a system undergoing desegregation is the assurance that tests administered to students are free from racial, ethnic and cultural bias. Black children are especially affected by biased testing procedures. As a result of such procedures, they may find themselves segregated in classrooms for slow learners, which will thereafter impede their educational growth. Moreover, the discriminatory use of tests results can cause resegregation.

The Detroit Board and State Board of Education are constitutionally mandated to eliminate all vestiges of

discrimination, including discrimination through improper testing. Thus, the Detroit Board and the State Board of Education must devise a program that will ensure that testing design, content and procedures are adaptable to a desegregated school system. The plan should include provisions dealing with staffing and costs involved. We have examined the Board's testing component carefully and have found it to be sufficiently comprehensive to serve as a model for such a testing program.

6. Student Rights and Responsibilities

By previous orders this court has demonstrated the high priority that it places on student rights and responsibilities, which the court has referred to as a Uniform Code of Conduct. We have also said that children living, learning and playing together convert a building into a human institution with a pulse and personality, and that when students, parents and teachers come together to live, learn and work the school develops an identifiable environment. It is this environment that the Detroit Board is constitutionally bound to protect in order to assure that every student can enjoy the right to a happy, healthy and rewarding school experience.¹⁷ Moreover, we agree with the plaintiffs' assertion that "[n]o violence whether against person or property, will be allowed to impede the implementation of the desegregation process. Both students and teachers must feel secure in their person and in their ability to perform their respective functions without fear of undue and unnecessary disruption."

It is the court's intention that from the commencement of the 1975-1976 school year the Board must not tolerate violence in any school in the system. Moreover, the court order will require that the Uniform Code of Conduct be administered uniformly without regard to regional lines. All regions will be obliged to follow prescribed forms and uniform procedures, to be devised by the Central Board and

¹⁷.

See this court's order of July 3, 1975.

approved by the court. The court will not, of course, attempt to substitute its judgment for the discretion of school administrative personnel in dealing with student violations of the Code. The court will ensure, however, that all Detroit students are afforded minimal right of due process consistent with *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). While the court is concerned that violence and vandalism do not impede the desegregative process, the court is equally concerned that the rights of the students are fully protected. In a system undergoing desegregation, black and white students will be subjected to teachers of both races who may apply the Code in a discriminatory manner. Staff members must be made aware of the rights of due process set forth in the Code. Moreover, students must be advised not only of the conduct prescribed, but also of their right to due process when involved in disciplinary procedures. The Code therefore, must simultaneously protect the students against arbitrary and discriminatory exclusions, suspensions or expulsions and assure that disruptions in the school or classroom will be dealt [1143] with in every instance. The court has recently received the Board's second draft of the proposed Code. Since the court has not had an opportunity to study this draft, the Board will await further directions from the court.

7. *School-Community Relations (Parental Involvement)*

The importance that the court places on this component is evident from the July 18, 1975 communication requiring the Detroit Board to submit a detailed plan for a community relations program, which the court has not yet had an opportunity to examine in detail. We agree with plaintiffs that an acceptable community relations plan should include provisions for school-community liaison and parental involvement. The school-community relations program should give real meaning to the decentralization anticipated by the Michigan Legislature and provide an effective vehicle for true community involvement in all the schools. To achieve maximum community participation the program should depend upon parental support; participants should be

selected voluntarily and serve without compensation. An effective community relations program must develop a partnership between the community and the schools and must cooperate with traditional groups such as parent-teacher organizations and local school advisory boards. There should be a cooperative flow of information from the school to the community and from the community to the school. Open and free discussion and participation in the desegregation process should be encouraged. The school-community relations organization should receive complete encouragement, budgetary support, direct assistance and a free flow of information from school authorities.

The school-community relations component shall be a subject of a separate order of this court. The portion of the Board's plan that includes a monitoring provision in the suggested community-relations component is rejected.

8. *Counseling and Career Guidance*

School districts undergoing desegregation inevitably place psychological pressures upon the students affected. Counselors are essential to provide solutions to the many problems that result from such pressures. Moreover, the success of the vocational and technical schools created herein depends upon the efforts of counselors whose guidance is essential to students seeking a career. Counselors can accomplish much to shape and guide the academic experiences of students. They assist student self-development and further can acquaint students with the vocational training possibilities available in the system. It will be essential that the counselors become fully acquainted with the vocational and technical offerings created herein. Accordingly, the order issued pursuant to these guidelines will require that the Detroit Board provide guidance and counseling services, including career counseling to the junior and senior high students in the Detroit system.¹⁸ The Board

18.

It is not for the court to determine how this program ought to be staffed. We note, however, that we are unaware of any school system that has deemed it beneficial to assign full-time counselors at the elementary school level. Some school systems have found that classroom teachers who are afforded appropriate in-service training make the best counselors at the elementary level.

is hereby directed to submit a career guidance and counseling plan.

9. *Co-curricular Activities*

Co-curricular activities are essential supportive programs in a system undergoing desegregation. Co-curricular activities further desegregation by providing student-to-student contact and interplay in a desegregated environment. The co-curricular program should include a provision for a limited junior high school consortium, which also encourages the sharing of educational experiences among students of both races. In addition to aiding desegregation, the co-curricular program can acquaint students [1144] with the many fine institutions available in the Detroit area, which have indicated their interest in aiding the court in providing quality education to Detroit school children. The junior high school consortium will enable students to share experiences while acquiring knowledge of such institutions as the Art Institute, the Detroit Public Library, the Merrill-Palmer Institute, Wayne State University and Shaw College. The court has reviewed the provision for co-curricular activities in the Board's plan and has concluded that it contains imaginative programs. The court's order will, therefore, require that the Detroit Board develop for the court's approval a specific plan for co-curricular activities including an analysis of the costs involved.

10. *Bilingual/Multi-Ethnic Studies*

Multi-ethnic studies are essential elements of the curriculum of any outstanding school system; desegregation serves only to emphasize the need for inclusion of these studies. Moreover, by state law school districts are required to provide adequate programs for bilingual and bi-cultural instruction. See Mich. Comp. Laws sections 340.360, 390, 391. The court order will further provide for these programs.

Currently, these programs are funded by Titles III and VII of ESAA. The Board is directed to re-apply for such funds to continue its program and in such application shall include provisions for in-service training for teachers involved in such programs. The Detroit Board is further

directed to seek the cooperation of Wayne State University's Ethnic Learning Resource Center in developing a resource program for comprehensive multi-ethnic instruction.

The Board shall submit finalized programs for each of these studies to the court including provisions for in-service training of the teachers involved.¹⁹

11. *Faculty Assignments*

The Detroit Board's plan contains a component dealing with reassignment of faculty, providing for a 50% ratio in every school. It has been noted that the teacher population in Detroit is now 49.5% black and hence nearly evenly bi-racial. However, no evidence was presented at this remedial hearing dealing with faculty segregation. Thus, it would be inappropriate for this court to order any reassignment of faculty at this time.

However, notwithstanding the prior holding of this court, affirmed on appeal, that the Detroit Board had not committed *de jure* acts of segregation of faculty, certain reassignments will be necessary to implement the desegregation order. Reassignments of faculty will be necessitated by the reassignments of students. Such faculty reassignments are incidental to the desegregation plan and shall be made with the purpose of further integrating the faculty. The Detroit Board and the Detroit Federation of Teachers shall immediately begin negotiations concerning reassignments necessitated by other components of this plan. Of course, in conducting these negotiations, both parties will no doubt be mindful of the federal requirement for racial composition of faculty and staff in a school system undergoing desegregation contained in USCFR 185.44(d)(3), *supra*.

¹⁹.

While we endorse the inclusion of these programs in a desegregation plan, we draw no conclusions with respect to the budget submitted by the Board in its plan, which appears to us to be excessive. Even assuming 163 bilingual teachers are needed, there should be a corresponding reduction in the number of regular classroom teachers.

Thereafter, both parties shall submit a report listing every school, student enrollment by race, the projected student enrollment by race following application of the plan, the present number of teachers in each school by race and the projected number of teachers by race following application of the court's order. These reports shall be submitted to the court prior to an evidentiary hearing to be set by the court.

[1145] 12. *Monitoring*

The court's order will provide for a court-created monitoring system to audit efforts made to implement the court's desegregation orders. The monitoring system created by the court shall provide for broad citizen participation. The monitoring group shall reflect the city's racial and ethnic composition so that the court can receive input from a broad spectrum of the city's population.

Because it is the court's constitutional obligation to audit efforts to implement its orders, the monitoring commission shall report directly to the court. The parties may, for the court's consideration, nominate citizens for appointment to the monitoring commission. The court is of the view, however, that the state, to whom the Fourteenth Amendment is addressed, has an equal obligation to oversee the efforts put forth and results achieved through implementation of the desegregation order. Accordingly, the court will order the State Superintendent of Public Instruction to seek the assistance of available state institutions to provide the supervisory and expert support staff needed to analyze and report the information thus obtained. The State Superintendent of Public Instruction shall suggest to the court a plan that includes the assistance of state-supported institutions such as the Title IV center of the University of Michigan.

In the court's view the monitoring of its orders is an essential part of a desegregation effort. The court recognizes that an effective monitoring procedure will require careful evaluation of the input from citizens' groups appointed. These groups shall be requested to develop meaningful

criteria for evaluation and to suggest and recommend methods for developing a uniform basis of reporting. It shall be the obligation of the State Superintendent and the institutions selected by him to collect and analyze all such data submitted and to provide sufficient staff to supervise the work of the monitoring committee.

VI. CONCLUSION

In developing these guidelines, this court has not intended to usurp the School Board's administrative authority. Neither has this court intended to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the school community. We are especially reluctant to do so in view of the fact that the school officials are willing to desegregate the school system. Their plan evidences their desire to cooperate in the desegregative effort. Pursuant to an order of this court, they submitted a comprehensive desegregation plan that did not attempt to rely solely upon their Magnet School Program for voluntary desegregation but instead included the forced transportation of a large number of students. Thus, we have taken into account that the "good faith conduct on the part of any litigant in any court, especially a court of equity and, more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration." *Montgomery County Board of Education v. Carr*, 400 F.2d 1, 2 (5th Cir. 1968).

Moreover, even after a finding of segregation has been made, it is the affirmative duty of the local school board to repair the effects of segregation by constructing a unitary system. But, at the same time, once the state has been found to have discriminated against a class of plaintiffs, it is the constitutional obligation of the court to assure that the denial of equal educational opportunity through segregation is fairly and justly remedied. Thus, the Board must remember that once it begins to desegregate, "the courts have a solemn obligation to determine whether the structure designed by the school board will house a unitary system. This obligation is unremitting . . . [1146] Accordingly, any imprimatur of

judicial approval must be entered with the caveat that until construction of a unitary system is completed, change orders, when appropriate, will be issued to ensure that the designed structure in fact accommodates a unitary system and not a bifurcated one." *Carr v. Montgomery County Board of Education*, 429 F.2d 382, 386 (5th Cir. 1970). It is in this context that the court issues these guidelines. It is for the court to declare *constitutional* standards applicable in a particular school district. The Board is free to do more than these announced standards require, so long as it demonstrates that its additional effort will have a salutary effect upon desegregation; it is the role of the court to ensure that it does not do less than what we have detailed here.

A successful desegregative effort will require cooperation and support from the entire community. Because Detroiters have always volunteered community support to advance worthwhile causes and because Detroiters know that the vitality of their city depends upon the excellence and stability of their school system, this court has already received expressions of support from the community. Many of Michigan's institutions of higher education, business corporations, labor unions and other organizations, public and private, have pledged their support and assistance to assure the successful development of quality education in the newly desegregated Detroit School System.

For example, Wayne State University, in cooperation with other institutions, can undertake prime responsibility in developing and conducting the in-service training program, which has received a high priority from this court.²⁰ Wayne County Community College has volunteered to consult with the Board and to assist it in the development and evaluation of the Board's proposed multi-ethnic component. It will

20.

We are informed at this writing that the Governor of the State of Michigan is aware of Detroit's need for this component. We have reason to believe that, consistent with his abiding interest in Michigan's educational system, he will approve necessary budgetary provisions to enable Wayne State University to participate.

further help with an orientation program for academic and guidance counselors. Additionally, labor and industry have demonstrated an active interest in the quality of education in the Detroit Schools. Both sectors of the community have assured the court of their willingness to cooperate and assist in this effort. Labor and industry can be of invaluable assistance by bringing their expertise to the vocational and technical high schools created herein. They can generate jobs for young people and possibly provide equipment needed by the school district. They can also provide opportunities for on-the-job training. It is hoped that the Board will succeed in matching colleges, universities, labor and industry with selected schools or programs to further enhance the attractions available in the school system. The Board, with the aid of the court's experts, should enter into specific agreements with these organizations in order to spell out precisely the roles they will play in assisting the Detroit schools. These institutions will not, of course, be solicited for financial contributions, nor do they intend to interfere with the administrative authority of the Detroit Board. These institutions want to be of assistance to Detroit school children; they have no desire to participate in the administration of the school system. Thus, our guidelines provide the seeds to generate community support.

The guidelines also continue the magnet system to which the school community has devoted so much time and funds. We have sought to strengthen those programs now in existence and have also provided for the creation of additional schools and added attractions, including the anticipated matching of [1147] schools with colleges, universities, business organizations and labor unions. As strengthened, these magnet programs will provide an opportunity for the occurrence of voluntary desegregation. Magnet programs, as a desegregation tool, have been approved by the Federal Education Acts of 1974, P.L. 93-380, § 214(f), 20 U.S.C. § 1713(f), and as strengthened by the court's guidelines will be sufficiently attractive to serve the dual purpose of providing quality education and voluntary desegregation. However, it must be remembered

that the primary goal of these magnet schools is to operate as desegregated schools taking account of the practicalities we have deemed constitutionally permissible to consider.

Although these magnet schools play an important role in the court's guidelines, this court recognizes that total desegregation cannot come about through magnet programs alone. Since 1972, the magnet program alone has proven inadequate to desegregate the Detroit Schools. However, while some transportation may be essential, we believe that the guidelines proposed have substantially reduced the number of students transported from the number involved in either the plaintiffs' or the Board's plan.

The cooperative effort of the entire community will assure a school system capable of fulfilling community aspirations. Such community support will provide the Detroit schools with an opportunity to make a fresh start. Those once deprived of equal opportunity by past discrimination will be assured that their schools are unequaled elsewhere; they will be assured that the injury from segregation, sometimes intangible, will be eradicated. With the support of the community, the court's order will create a unitary school system and assure that past discriminatory practices will neither inflict further injury nor occur again. A school system must evolve that is concerned not with black children or white children, but just children.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al.,

Plaintiffs,

v.

**WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants.**

**Civil No.
35257**

PARTIAL JUDGMENT AND ORDER

Pursuant to the Findings of Fact and Conclusions of Law contained in the Memorandum Opinion filed this cause on this date, IT IS ORDERED AND ADJUDGED that:

(1) The plaintiffs' plan for desegregating the Detroit City Schools shall be and hereby is rejected;

(2) The defendant Detroit Board of Education's plan for desegregating the Detroit City Schools shall be and hereby is rejected in part and adopted in part for reasons set forth in the court's Memorandum Opinion.

IT IS FURTHER ORDERED that:

(1) The defendant Detroit Board of Education and the General Superintendent of Schools, together with a staff unit appointed by the Superintendent, shall, in cooperation with the court's appointed experts, prepare and cause to be prepared a revised desegregation plan for approval by the court, which plan shall incorporate the guidelines contained in Section V "Remedial Guidelines" of the court's Memorandum Opinion;

[2] (2) Said revised plan shall take into account provisions of this order relating to school closings, new construction and school capacities;

(3) Said plan shall be filed with the court as promptly as circumstances permit and the defendant Detroit Board of Education shall forthwith submit for the court's approval a suggested target date for submission of the final plan;

(4) The revised plan shall desegregate as many elementary schools as possible by rezoning and, where small changes in enrollment will desegregate such schools, shall utilize satellite zones. The defendant Detroit Board of Education shall select satellites that permit children transported during their elementary educational period the opportunity to attend a neighborhood middle school.

The revised plan shall provide for a K-5 elementary school grade structure, PROVIDED, HOWEVER, that the grade structure created herein may be altered when, but only when, the defendant Detroit Board of Education can establish that failure to so alter grade structures will lessen the resulting degree of desegregation or will result in excessive travel distances or inconvenience to pupils.

Said plan shall provide for the pairing of schools after a satisfactory showing that such schools could not be otherwise desegregated. In cases in which school pairing is essential, the plan shall provide that desegregation of the K-5 schools will be accomplished by [3] exchanging pupils between the paired schools and shall further provide that the pupils transported will be rotated annually or semi-annually so that children will attend the school closest to their home every other school year or one-half school year, unless the defendant Detroit Board of Education establishes that other procedures are more feasible.

(5) Said plan shall provide for middle schools with a 6-8 grade structure and shall identify all schools designated as middle schools. If a uniform grade structure cannot be maintained, the plan shall fully set forth the reasons therefor and shall in such event include a school building utilization plan indicating the proposed grade structure for each building.

(a) To assure the greatest degree of desegregation, such plan shall provide for two types of middle schools: zoned middle schools and open enrollment middle schools. The open enrollment middle schools shall function in a manner similar to present Magnet Schools and all such schools shall have a controlled enrollment consistent with the guidelines contained in the court's Memorandum Opinion.

(b) The plan shall, for the zoned middle schools, develop zones that provide as many walk-in schools as circumstances permit. Middle schools shall have controlled enrollments as set forth in the guidelines in the court's Memorandum Opinion. The revised plan shall provide that no child may be transported from his or her neighborhood [4] school for more than five of his or her first eight school years. Accordingly, if the child is transported for desegregation at the elementary level for five years, the child will be assigned to a middle school located in the child's attendance area. If this provision cannot be achieved, the defendant Detroit Board of Education shall report where exceptions must be made and the number of children involved by race.

(c) In developing zones for middle schools, the defendant Detroit Board of Education plan shall consider utilization of satellite zones, PROVIDED, HOWEVER, that the selection of such satellites does not result in creating housing instability which might occur from differing treatment of contiguous zones.

(d) In the revised plan, the defendant Detroit Board of Education shall identify each middle school with its projected enrollment by race, and further identify the age and condition of the building and special facilities available (i.e., shops, auditoriums, gymnasiums, swimming pools, etc.) at each middle school. Where differences exist, the Board shall provide a summary of such differences in facilities.

(6) All senior high schools in the system shall enroll students in grades 9-12. Where modifications must be made to presently existing attendance zones to achieve such grade structure, the defendant Detroit Board of Education will forthwith prepare and submit maps depicting the newly created attendance zones.

[5] The newly created technical high schools and the vocational centers shall be city-wide schools. Assignments to these schools and administration of these schools shall be under the control of the Central Board and the General Superintendent. The Superintendent will devise curriculum offerings that are responsive to the needs and interests of the City of Detroit.

IT IS FURTHER ORDERED that:

The Detroit Board of Education and the General Superintendent, together with a staff unit appointed by such Superintendent, shall design, develop and institute a comprehensive instructional program for teaching reading and communication skills. Such educational program shall be characterized by excellence and shall be instituted in every school in the system;

The Detroit Board of Education is FURTHER ORDERED to institute remedial programs to correct past reading deficiencies to accommodate all students still enrolled in the Detroit Public Schools;

The Detroit Board of Education is FURTHER ORDERED to select a committee made up of community members expert in this field to cooperate with such effort.

IT IS FURTHER ORDERED that:

(1) The defendants Detroit Board of Education, the General Superintendent of Schools and a staff unit designated by him, the State Board of Education, and the Superintendent of Public Instruction shall develop and formulate a plan for and thereafter create [6] four vocational centers to teach the construction trades, transportation and related trades, health services, and arts and crafts. Said vocational centers so provided in the plan shall include a grade 13 to provide advanced offerings that permit students to thereafter qualify for transfer to comparable community college programs. Said named defendants shall in addition develop and formulate a joint plan for creation of two additional technical high schools patterned after Cass Technical High School, which shall specialize in business education;

(2) The joint plan so submitted by the named defendants herein shall be submitted on or before August 29, 1975, and shall:

- (a) Indicate the site selected for each vocational center and technical high school so created herein and indicate whether new construction or conversion of an existing facility is anticipated;
- (b) In the event conversion of an existing facility is anticipated, disclose where students presently assigned to such facilities will be reassigned and the resulting effect of such reassignment upon desegregation, together with maps reflecting changed attendance areas resulting from elimination of areas of converted facilities;

- (c) Detail the curricula and program offerings for students attending the vocational and technical high schools created herein;

[7]

- (d) Include provisions for bi-lingual and "special needs" institutions;

- (e) Cause a study to be made by the defendant Detroit Board of Education of all high school curricula. The Board shall thereafter assure that unnecessary duplications are eliminated to avoid diminishing the desegregative attractions of such schools created herein and phase out outdated programs; and

- (f) Provide assurances that vocational centers created for the 1975-1976 school year are properly equipped and staffed. Defendants shall at all times be attentive to procedures disruptive to the continuity of a student's education.

(3) The defendants shall submit simultaneously therewith a detailed cost analysis and time schedule for new construction to be undertaken or conversions to be made;

(4) The vocational high schools and the technical high schools created herein, including the presently existing Cass Technical High School, shall be city-wide schools subject to open enrollment and shall be administered by the Central Board of Education and the General Superintendent. Said schools created herein shall at all times maintain a controlled enrollment as set forth in the guidelines contained in the court's Memorandum Opinion. The defendants shall further provide that any student may seek transfer from the school he or [8] she attends to any city-wide school containing available space when such transfer would diminish racial imbalance;

(5) The defendant Detroit Board of Education shall further undertake a study to determine the feasibility of providing an alternate form of education following the Parkway Concept, and shall, on or before October 1, 1975, report the results of such study to the court.

IT IS FURTHER ORDERED that:

(1) The Detroit Board of Education shall, consistent with the guidelines contained in the court's Memorandum Opinion, institute comprehensive programs for:

In-Service Training;
Bi-Lingual/Multi-Ethnic Studies;
Counseling and Career Guidance;
Testing;
Co-Curricular Activities.

(2) The defendants Detroit Board of Education and the State Board of Education shall jointly formulate and devise a comprehensive testing program consistent with the goals of a desegregated system and shall include in such plans provisions for additional staff to supervise and administer such program adequately;

(3) Each region may, within the limits established by state standards, continue the policies of the Central Board and the guidelines contained in the court's Memorandum Opinion to develop its own curricula responsive to the needs of parents and students within their boundaries;

[9] (4) All co-curricular activities, extra-curricular activities, athletic programs and junior high school consortium programs shall be conducted on a desegregated basis as devised or approved by the Central Board of Education and/or the General Superintendent.

(5) The bi-lingual program instituted by the defendant Detroit Board of Education shall comply with state

requirements as contained in MCL §§ 340.360; 340.390-395;

(6) The defendant Detroit Board of Education shall provide bi-lingual instruction for all kindergarten students requesting such instruction. The General Superintendent shall have the responsibility of assigning such students to designated schools and such assignments shall provide that each class shall contain at least twenty (20) students.

IT IS FURTHER ORDERED that:

The Students' Rights and Responsibilities, Community Relations, and Monitoring Components provided for in the court's Memorandum Opinion shall await further study of revisions submitted thereto and will be subject to further orders of the court, PROVIDED, HOWEVER, the defendant State Superintendent of Public Instruction shall forthwith file with the court a proposed plan for monitoring the court's desegregation effort and shall include therein the requirements and directions contained in the court's Memorandum Opinion.

[10] IT IS FURTHER ORDERED that:

The defendants Detroit Board of Education and the Detroit Federation of Teachers shall immediately begin negotiations concerning reassignments necessitated by the provisions of this order and the court's Memorandum Opinion, and during said negotiations defendants shall be mindful of the requirements for racial composition of faculty and staff in a school system undergoing desegregation contained in CFR 185.44(d)(3);

The defendants are FURTHER ORDERED to submit a report with the court, which report shall list every school, student enrollment by race, the projected student enrollment by race following application of the

revised desegregation plan, the present number of teachers in each school by race, and the projected number of teachers by race following application of the revised plan.

IT IS FURTHER ORDERED that:

The defendant Detroit Board of Education shall have the sole responsibility for designating all schools in the district that shall provide kindergarten classes. The General Superintendent shall assume the responsibility to assure that all kindergarten classes are desegregated wherever possible; PROVIDED, HOWEVER, that in no event shall kindergarten children be reassigned to schools beyond the school closest to their residence, except where such school has not been designated as a kindergarten school.

[11] IT IS FURTHER ORDERED that:

(1) The defendant Detroit Board of Education shall formulate plans for closing as many undesirable and outdated school facilities as possible. To further desegregation, the defendant Board may take any school out of service. Such plan for school closings shall take into consideration the provisions contained herein for new school construction and shall coordinate school closings and construction to facilitate desegregation and to further assure that minority students have facilities equal to those in the remaining portions of the city;

(2) The General Superintendent shall forthwith file with the court a document identifying the site and size of all schools to be closed or taken out of service together with a time schedule for doing so;

(3) The defendant Detroit Board of Education shall forthwith formulate a program for equalizing all school facilities and buildings subject only to the constraints contained herein for new construction;

(4) The General Superintendent and a staff unit designated by him shall assume the responsibility for assuring that the student body assigned to each facility does not exceed the total capacity shown for such facility. However, the student body may be less than capacity when necessary to further desegregation or accommodate class size and teacher-pupil ratios.

[12] IT IS FURTHER ORDERED that:

The defendant Detroit Board of Education and the defendant State Board of Education shall submit a joint analysis of all cost considerations necessary to implement this order, PROVIDED, HOWEVER, that such cost analysis shall take into account reductions incurred through institutional support available pursuant to agreements provided for in the court's Memorandum Opinion and available grants.* The financing considerations relating to all aspects of this order will be subject to further orders of this court, PROVIDED, HOWEVER, that the defendant State Board of Education shall undertake to establish the vocational centers created herein.

IT IS FURTHER ORDERED that:

The defendants Detroit Board of Education and the State Board of Education shall file forthwith, for court approval, a time schedule for implementing all aspects of this order, including, but not limited to:

- (a) The date for submission of a revised student reassignment plan;

* Wayne State University will, for example, assist in the court's requirement for in-service training. Other institutions have offered to assist in the court's requirements for research, study, and teacher training. Grants are available for curriculum and program development.

- (b) The date for commencement of the instructional program for teaching reading and communication skills in all Detroit Schools;

[13]

- (c) The date for creation of four vocational centers and two technical high schools;
- (d) The date for commencement of in-service training;
- (e) The date for commencement of bi-lingual and multi-ethnic programs;
- (f) The date for commencement of counseling and career guidance programs;
- (g) The date for commencement of non-discriminatory testing programs;
- (h) The date for commencement of the co-curricular program;
- (i) The date for submission of a plan for school closings and new school construction; and
- (j) The date for submission of an analysis of all required expenditures.

IT IS FURTHER ORDERED that:

- (1) The injunction heretofore issued enjoining expenditures for construction shall be and hereby is set aside;

- (2) The defendant Detroit Board of Education shall undertake a comprehensive construction and renovation program, PROVIDED, HOWEVER, that the Board shall, prior to undertaking any and all expenditures for [14] construction, obtain approval of the court and PROVIDED FURTHER that such construction and renovation program shall, in the order following:

- (a) Further desegregation;
- (b) Implement any one or more of the provisions of this order; and
- (c) Tend to equalize facilities.

IT IS FURTHER ORDERED that:

(1) The court's jurisdiction in this cause shall be continuing and the parties hereto shall be subject to change orders filed pursuant to the court's jurisdiction;

(2) All previous orders of the court, not inconsistent with the Memorandum Opinion shall remain in full force and effect unless amended or modified by the court in furtherance of its jurisdiction or upon the request of any party for clarification and/or supplementation pursuant to a motion so entitled;

(3) This court's order of May 21, 1975, regarding the purchase of 150 busses is reaffirmed. The defendant Detroit Board of Education is directed to begin utilizing these buses for all Detroit school children requiring transportation, including transportation to relieve overcrowding, to accommodate dangerous crossings and to accommodate excessive distances. Where such busses are available, no Detroit student shall be transported in chartered busses.

[15] IT IS FURTHER ORDERED that:

The defendants Detroit Board of Education, the General Superintendent therefor, his administrative staff, the Regional Boards and each member thereof, the State Board of Education and each member thereof, the Superintendent of Public Instruction, the Attorney General, the State Treasurer, their officers, agents, servants, employees and attorneys and all other persons in active concert or participation with them who receive

notice of the court's orders are HEREBY ORDERED to implement the provisions of said order and to comply with each provision contained therein.

ROBERT E. DeMASCIO /s/
Robert E. DeMascio
United States District Judge

Dated: August 15, 1975

[943]

411 F. Supp. 943 (1975)

Ronald BRADLEY et al.,

Plaintiffs,

v.

William G. MILLIKEN, Governor of
the State of Michigan, et al.,
Defendants.

Civil No.
35257.

United States District Court,
E. D. Michigan, S. D.

Nov. 4, 1975.

MEMORANDUM AND ORDER

DeMASCIO, District Judge.

At the inception of the remedial phase of this litigation, the court directed the parties to submit plans to effectively establish a unitary school system. After affording the parties approximately 30 days to attempt to resolve their differences, the court conducted extensive [944] hearings on the plans submitted.¹ The parties were persistent in their different views of what constituted desegregation. The plaintiffs adhered steadfastly to the view that desegregation required that the racial composition of every school in the system conform to within 15% of the system-wide racial ratio, that other considerations furthering integration were not relevant toward the formulation of a desegregation plan, and that existing practicalities at hand were not relevant. The

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The hearings extended from April 29 to June 27, 1975, consuming approximately nine weeks.

defendant Detroit Board of Education contended that a just and feasible plan must give consideration to the "practicalities of the situation" such as the racial ratio existing in the school community, which is predominantly black by wide margins, shifting population trends and demography, the financial plight of the school district, the need for school, neighborhood and community stability, and assurances that the district be able to provide optimal educational opportunities for all children, and that an effective desegregation plan should not look merely to the present, but should desegregate "now and hereafter" by preventing resegregation.

Upon completion of the hearings, the court carefully examined the plans together with all the evidence submitted. We concluded that both plans were too rigidly structured because of adherence to fixed racial ratios (which was found to be not only undesirable but constitutionally infirm), that both plans failed to properly weight the essential "practicalities of the situation", that neither plan exhausted alternatives in light of such practicalities, and that neither plan appropriately balanced the equitable burdens with the desegregative results achieved. On August 26, 1975, we directed the defendant Detroit Board to prepare a revised plan, which was submitted on September 19, 1975. On October 8, 1975, we directed the Detroit Board to re-evaluate various aspects of its September 19, 1975 plan, and the Board again submitted a revision on October 21, 1975.

Thus, this is the third occasion the court has had to carefully examine every detail of the Detroit Board's desegregation plan. The sole purpose of our detailed examination has been to devise a "just, feasible and equitable" desegregation plan pursuant to a United States Supreme Court mandate that we formulate a "decree directed to eliminating the segregation found to exist in the Detroit city schools. . . ." We have found that the revised plan closely parallels the court's guidelines. There are instances in which the Detroit Board employs parameters at

variance with the guidelines, but we have said that the Detroit Board may do so, provided the plan itself discloses that the additional effort will have a salutary affect upon desegregation (Memorandum Opinion, August 15, 1975, p. 121), since a cooperative board should be afforded discretion to weigh the practicalities at hand. This does not mean, however, that the Detroit Board is free to charter a course beyond the guidelines to accommodate individual philosophies or regional goals. We have been careful to ensure that where the plan exceeds the court's guidelines, the plan discloses the practicalities considered and the reasons for affording varying weight to those practicalities.

We are satisfied that the revised plan, which we today order implemented with some modifications made by the court,² is an effective and equitable desegregation plan within the constitutional guidelines that we have provided. The plan exhausts alternatives to two-way bussing, such as re-zoning and creation of satellites, and does not adhere to rigid racial ratios. Rather, the plan is flexible, as it permits variations derived by weighing the practicalities at hand and places into equitable balance the objectives sought and the results to be [1945] achieved. (Memo. Op., p. 87).³ The plan recognizes the need to preserve walk-in schools in integrated neighborhoods, and contains the flexibility needed to encourage stability in integrated neighborhoods. The flexibility of the plan is further demonstrated by the fact that where reassignments are made at the elementary level, the students involved are assigned to a walk-in middle school or high school. Moreover, the plan provides for rotation of classes between paired schools to lessen or equalize the transportation burden (Memo. Op., pp. 91, 93). Most important, the

2.

We have concluded that a desegregation plan must be implemented during the Winter Term 1976. Time considerations will not permit another request for re-evaluation of the modifications mandated.

3.

Our guidelines discard the use of rigid ratios in the desegregative effort. We suggest a 50-50 racial ratio as a starting point, but permit deviation therefrom depending upon the practicalities surrounding each individual school.

plan avoids transportation serving no desegregative purpose, such as bussing black children long distances to attend predominantly black schools. The court is satisfied that wherever transportation of white or black children is ordered, it serves a desegregative purpose. Thus, the plan is sensitive to the educational aspirations of the children and parents of Detroit who are not themselves responsible for the invidious violations exposed during the liability phase of these hearings.

We do not mean to imply that the plan, even with the modifications made by the court, is perfect. Future events may well dictate that other selections are more desirable; practicalities will change. But we are confident that, with the continued guidance of the court, the Detroit Board will remain responsive to changing practicalities. We are reminded that, even after a finding of segregation, it is the affirmative duty of the local school board to repair the effects of segregation. We found the Detroit Board is willing to assume its constitutional duty to do so (Memo. Op., p. 65) and have taken into account that the "good faith conduct on the part of any litigant in any court, especially a court of equity, and more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration." [Memo. Op., p. 120, quoting *Montgomery County Board of Education v. Carr*, 400 F.2d 1, 2 (5th Cir. 1968).] Once the Detroit Board has accepted its responsibility, the court's only remaining obligation is "to determine whether the structure designed by the school board will house a unitary system." (Memo. Op., p. 121.) We are confident that the Detroit Board will continue to seek an equitable balance of the essential "practicalities of the situation."

We have heretofore concluded that an appropriate plan must consider legitimate community concerns. Thus, it is constitutionally permissible for the Detroit Board to consider practicalities that truly exist and are not contrived to defeat desegregation. Such legitimate concerns deserving weight include the undesirability of forced student reassignments achieving only negligible desegregative results, the undesirability of bussing black children to predominantly black

schools, the rapidly shifting population trends occurring naturally in the school district, the decrease in overall student enrollment coupled with the persistent increase in black student enrollment, the predominantly black racial ratio, the depressed economy of the community created by the highest rate of unemployment in the nation, and the financially crippled school district's inability to improve its financial position (Memo. Op., p. 4). The Detroit community is thus assured that the court's guidelines and the plan implemented pursuant thereto fully weigh all the "practicalities of the situation" and at the same time make "every effort to achieve the greatest possible degree of actual desegregation." *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971).⁴ We have been attentive to the [946] obvious need for residential stability (Memo. Op., p. 2). We have said and again emphasize that "... an effective and feasible remedy must prevent resegregation at all costs. . . . In a school district that is only 26% white,⁵ a remedy that does not take account of the possibility of resegregation will be short-lived and useless if that percentage of whites further decreased." (Memo. Op., p. 4.)

We are fully aware of the community concern for the hardships involved in forced reassignments, particularly through the use of school bussing. This awareness influenced the court to scrutinize every school involved in the plan carefully to ascertain that the desegregative results achieved warranted the burdens imposed. For example, the court

4.

The plan tracks the court's guidelines as well as might be expected. The school authorities transport approximately 22,000 students and provide walk-in schools for an additional 6,000 students. It is important to emphasize that the school district has always transported 14,000 students to relieve overcrowding and to avoid hazardous crossings. By more efficient use of the transportation already existing, the plan realizes a net gain of 8,000.

5.

The 1975 fourth Friday count discloses that this figure is now 23% white.

rejected the reassignment of students from the Grayling or Greenfield Union Schools, finding that, although each school was slightly under the 30% black figure that the court used to define a desegregated school, "[t]he presence of other minorities in significant numbers is a permissible practicality to be taken into account when deciding whether a school should be included in reassignment plan." Memorandum and Order of October 8, 1975, at p. 5. In another instance, the court objected to the pairing of the Beard and Wingert Schools because, even though substantial desegregation would result, we found it inequitable to pair Beard with a school as far away as Wingert while other schools adjacent to Beard (Higgins, Harms and Bennett) were paired with schools located much closer to their neighborhood. The court referred to its finding that "there should not be great variances in the transportation burden falling on adjacent areas because such variations will influence residential patterns." (Memo. Op., p. 92.) To further illustrate the close scrutiny the court gave to each aspect of the reassignment plan, we were able to eliminate much needless transportation in Region 7 by rejecting a Board proposal to convert the Wayne Elementary School (92% white) to a middle school and transport Wayne students to Burbank School (97% white). We reminded the Detroit Board that "the bussing of white children to predominantly white schools . . . serves no desegregative purpose and is no less objectionable [than the bussing of black children to predominantly black schools]." Memo. and Order of October 8, 1975, at p. 5.

While some members of the community may be displeased over some of the reassignments the court has deemed essential, it is our hope that their burden will be made easier to bear by the knowledge that the court has given full consideration to every reassignment and has permitted the reassignment of students only where it has concluded that the desegregative results achieved justify the burdens imposed. Moreover, Detroit citizens can be further assured that the court has taken steps to improve the quality of education and has not permitted transfers where the receiving school is not comparable in all respects to the

sending school. With assurances that the court and the Detroit Board have carefully weighed the practicalities, we are confident that the Detroit community will recognize that what is implemented today is constitutionally mandated. The citizens of Detroit know that the law must be obeyed.

We have said that a successful desegregative effort emphasizing quality education will require the cooperation and the support of the entire community. We know that Detroiters have always volunteered community support to advance worthwhile causes. We know of no greater cause than rejuvenating the vitality of the city's schools. A vibrant school system will assure stability for city and community alike. Having assured the Detroit community that the court has weighed the practicalities of the situation fully, we are confident that the plan will receive the cooperation and support of the entire community. When [947] cooperation and support are granted freely, the plan will succeed. The support of the community will afford the Detroit school system an opportunity to make a fresh start. This support will enable the school system to fulfill the community aspirations for desegregated quality education for all children. It is our belief that the guidelines announced will create a unitary school system of which Detroit citizens can be proud. A quality school system will evolve that is concerned not with black children nor white children, but just children.

Accordingly, IT IS HEREBY ORDERED that the defendant Detroit Board of Education implement and cause to be implemented the desegregation plan on or before the beginning of the Winter Semester, 1976;

IT IS FURTHER ORDERED that the defendant Detroit Board of Education shall direct its Interim General Superintendent to formulate a program for the implementation of the desegregation plan, and that the defendant Detroit Board of Education shall submit to the court, on or before December 19, 1975, the program as formulated for the appropriate implementation;

IT IS FURTHER ORDERED that, pursuant to the October 2, 1975 order of the U.S. Sixth Circuit Court of Appeals, the parties hereto shall appear before this court on December 1, 1975, at 9:00 A.M., for an appropriate order concerning school closings proposed on pages 10-11 of the defendant Detroit Board of Education's submission of October 21, 1975.

APPENDIX

The plan has been developed from the Detroit Board of Education's submissions of September 19 and October 21, 1975. We recognize that the successful implementation of a desegregation plan will require solutions to a variety of problems and that the rapidly shifting population trend may create new problems.

Because the school district reschedules classes each semester as a part of its regular practice, we do not see any difficulty in implementing the plan at the start of the winter semester at the lower grade level.¹ Moreover, since many high schools already enroll the ninth grade, we do not see many problems caused by the reassignment of ninth graders pursuant to the court's order to change junior high schools to grade 6-8 middle schools. However, desegregation of the high schools poses a number of problems not faced by elementary and middle schools. Since school programs become more specialized at higher grade levels, special provisions must be made for the phasing in of the plan at the high school level. Reassignments occurring during the school year may pose an especially difficult burden for high school students because of the possibility that the receiving high school will not have the same educational programs as the sending high school.

While there is no easy solution to the problem of desegregating the high schools, the Detroit Board may wish

1.

It is difficult to ascertain from the plan the precise pairing procedures employed. In Region 2, for example, we have designated schools where rotation pairing is appropriate (see p. 13 of the Plan).

to consider a change in the method of high school assignments that will facilitate desegregation. While the Detroit Board makes assignments of students to high schools that are dependent upon middle school or junior high school assignments, many school districts structure high school attendance zones without regard to junior high school assignments. Such a method of assignment possesses greater flexibility and might be of aid to desegregation. The Detroit Board's present method of making high school assignments places unnecessary constraints on desegregation, and does not minimize student travel to high school. The Detroit Board may wish to consider making high school assignments on the basis of elementary attendance zones alone, with zones possibly being split where it proves advantageous for desegregation or convenience of students. [948] This recommendation is particularly appropriate for Regions 4, 6 and 7. Moreover, where high school students are reassigned for desegregative purposes, fairness would require that they be provided transportation where they are assigned to a high school more than two miles from their residence.

The Detroit Board of Education should require that its staff review the attached plan in detail to assure that it is just and feasible. The responsibility remains with the Detroit Board to notify the court if features in the plan require revision because of changing practicalities. In that event, the Detroit Board should proceed by filing a petition for revision of any specific school assignment for the court's consideration.

Finally, the Detroit Board of Education shall establish and publicize an information center that is adequately equipped and staffed to provide a source for dispensing accurate information concerning the desegregation plan to the public and school community. In addition to responding to inquiries, the information center should have a mechanism for accepting suggestions and constructive criticism from parents and other members of the community.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**RONALD BRADLEY, et al.,
Plaintiffs,**

v.

**WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants.**

**Civil No.
35257**

JUDGMENT

This cause came before the court on submissions of desegregation plans submitted by the defendant Detroit Board of Education, and this court having entered its Memorandum and Order on November 4, 1975;

IT IS ORDERED AND ADJUDGED that the defendant Detroit Board of Education implement and cause to be implemented the desegregation plan attached to the court's Memorandum and Order of November 4, 1975, the plan for vocational schools as set out in the court's Memorandum and Order of November 10, 1975, the uniform code of conduct attached to the court's Memorandum and Order of October 29, 1975, and the monitoring commission as set forth in the court's Memorandum Order of October 16, 1975.

Dated at Detroit, Michigan, this 20th day of November 1975.

**ROBERT E. DeMASCIO /s/
Robert E. DeMascio
United States District Judge**

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al., Plaintiffs, v. WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al., Defendants.	Civil No. 35257
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MEMORANDUM, ORDER AND JUDGMENT

(a) Introduction:

On August 15, 1975, we entered a partial remedial judgment in the Detroit school desegregation case, which has been in litigation since 1970. On that date, because neither party had submitted an acceptable desegregation plan, we enunciated guidelines for altering attendance patterns and decreed that the implementation of 11 educational components was necessary to eradicate the effects of past segregation.¹ We did not create a transportation plan, but rather we left to the defendant Detroit Board of Education the burden of fashioning a plan consistent with the announced guidelines. We explicitly held that it was the Detroit Board's legal obligation to formulate an acceptable plan, not the court's obligation. We subsequently examined the revised plans that the Detroit Board submitted and, only when we were satisfied that the revised plan conformed to

¹ See 402 F. Supp. 1096, 1118.

our guidelines, ordered a transportation plan [2] into effect.² Just as the August 15, 1975 order was not specific about the precise details of the transportation plan, it was likewise unspecific about the details of the educational components. We also provided that the details of these components were to be worked out between the defendants and the court. The August 15, 1975 order set dates for submission of detailed programs to implement essential educational components; some of the components were to be developed solely by the Detroit Board, while others were to be developed jointly by the Detroit Board and the State Board of Education. We did, however, clearly indicate that, since the Detroit Board and the State Board of Education participated in practices that created a racially segregated school system, both would be required to participate in effecting a remedy.³

Today, we enter our final judgment in this matter. However, we emphasize that today's judgment and order deal with nothing new. Rather, today's judgment merely mandates implementation of those matters forecasted in our August 15, 1975 order. Pursuant to that order, the Detroit Board has submitted proposals for the educational components. Their proposals have been carefully reviewed by the court, and in several instances proposals were returned to the parties for suggested revisions. In some instances, [3] we have had the benefit of a critique submitted by the Executive Committee of the court's Monitoring Commission. Mindful that this remedial decree will be paid for by the taxpayers of

2. While the revised plans were under consideration, the plaintiffs requested a hearing to document their objections. However, it was our view that a hearing would not be appropriate. The adversarial phase of this litigation ended with the August 15, 1975 partial judgment; the issue of the conformance of the revised plan with our guidelines was an issue solely between the defendant Detroit Board and the court. Thus, our failure to include plaintiffs in the process of shaping the details of the transportation plan was not motivated by indifference to their views, but rather reflected the fact that the adversarial phase of this litigation had ended. Plaintiffs' review of the validity of the guidelines was on appeal. (See also our Memorandum and Order, dated October 31, 1975.)

3. See *Bradley v. Milliken*, 338 F. Supp. 582, 588-589, *aff'd* 484 F.2d 215, *rev'd on other grounds*, 418 U.S. 717 (1974).

the City of Detroit and the State of Michigan, we have been careful to order only what is essential for a school district undergoing desegregation. While the details of the proposals were submitted by the parties, the court has examined every detail in each proposal to ensure that the components we order are necessary to repair the effects of past segregation, assure a successful desegregation effort and minimize the possibility of resegregation.

(b) *Vocational Centers:*

To illustrate the court's attentiveness to details prior to fashioning this remedial decree, we shall briefly trace the way in which the vocational education component came to be ordered into effect. Our August 15, 1975 order directed that the Detroit Board and the State Board of Education jointly prepare and submit a plan for the construction and implementation of five vocational centers. We examined the plan submitted, conducted in-chamber conferences with the parties, suggested revisions, and, on November 10, 1975 ordered the revised plan⁴ into effect. That order directed the Detroit Board and the State Board to proceed jointly to identify and acquire suitable sites for five area vocational centers and to take all steps necessary to complete their construction as promptly as circumstances permitted. The intent of the order, of course, was to have the defendants jointly create a vocational education system. We provided that [4] the Detroit Board's share of construction funds was to be derived from its bonding capacity. Thus, that order adopted the revised plan and spelled out the rights and responsibilities of the defendants in connection therewith. However, the parties responded as if the adversarial phase of this litigation had not ended. The state filed a motion seeking a modification of that order which, in effect, would exclude it

4. The original vocational education plan was submitted on August 29, 1975; a revised plan was submitted on October 3, 1975.

from participation in establishing the five area vocational centers.⁵

Reluctantly, on February 17, 1976, we afforded the state an opportunity to be heard on its motion. During the hearing, it became apparent that the parties were not concerned with how the court-ordered remedy would be implemented, but were attempting instead to re-litigate the responsibility of each to participate [5] in the remedy. They sought to continue an adversary proceeding that had long since been concluded. Accordingly, we interrupted the hearings and adjourned for an in-chamber conference. At that conference, on February 19, 1976, we reminded the defendants that each had been found guilty of *de jure* acts of segregation, and that each must bear a share of the remedial burden. We further reminded them that it was time to abandon adversary positions, that it was time to renew their concern for the educational welfare of Detroit's school children, that the

5.

Of course, the defendant Detroit Board responded with other motions and briefs. The state contended, as it has throughout this litigation, that because there had been no finding of a constitutional violation by the state defendants with regard to the presence or absence of vocational centers, a remedial decree ordering them to participate in creating vocational centers would exceed the nature of the constitutional violation contrary to the holding of *Swann v. Board of Education*, 402 U.S. 1 (1971). We have addressed and rejected this argument on many occasions. We pointed out that the state's argument distorted the holding of *Milliken v. Bradley*, 418 U.S. 717 (1974), wherein the Supreme Court used the language from *Swann* cited by the state defendants to reverse a remedial decree that involved parties against whom no constitutional violation had been alleged or proved. Here, on the other hand, there has been a positive finding of segregation against the state; we do not believe that *Swann* or *Milliken* prevents this court from utilizing the traditional range of federal equity powers to create a unitary system and to repair the damaging effects of past *de jure* acts of segregation. In our August 15, 1975 Memorandum Opinion, we found that "while it is true that the delivery of quality desegregative educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy aspects of past segregation . . ." (See 402 F. Supp. 1096, 1118.) Thus, while the state has not been adjudged liable specifically for its failure to create vocational centers, because we have deemed that the creation of vocational centers is necessary to repair the effects of past segregation, such a remedy is not beyond the scope of the adjudicated violation. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

survival of the city's school system was the responsibility of the state defendants as well as the Detroit Board, and that the persistent assertion of adversary positions, seeking to minimize the participation of each, did not contribute to a solution to the chaotic problems that exist in the Detroit city schools. The parties responded admirably.

As a consequence of our encouragement, the State Board of Education and the Detroit Board of Education entered into a stipulation providing that each defendant board share equally the burden of creating five area vocational education centers.⁶ We are reminded that this stipulation represents the first time in almost six years of litigation that the parties were able to agree to anything with respect to the remedial aspects of this case. We are hopeful that this stipulation will mark the beginning of a new resolution by each party to accept responsibility for eradicating every vestage of past segregation for the benefit of all children, black and white. It is also our hope that plaintiffs, too, will see the wisdom in compromising differences that may still exist. Surely, plaintiffs must know that the "practicalities [6] of the situation" taken into account in our opinion were, indeed, essential to preserve the Detroit city school system. See 402 F. Supp. 1096, 1102. If greater desegregation is possible in a school district now 76% black, it can better be achieved through compromise than through litigation.⁷ How long must the present board bear the responsibility for past invidiously discriminatory acts committed by board members who have long since departed? We are reminded that as early as 1970, the Detroit Board came forward with a plan to desegregate. That plan would have been implemented were it not for the intervening passage of Act 48 by the Michigan Legislature.

6.

That stipulation and the resolution passed by each board are attached as an appendix and incorporated as a part of our judgment.

7.

From the recent statistical data available, it is apparent that in September 1976 the Detroit school system will be 80% black. In the Atlanta school district, the plaintiffs recognized the practicalities of the situation existing in that district and entered into an agreement to achieve maximum desegregation rather than continue litigation. See *Calhoun v. Cook*, 362 F.Supp. 1249 (N.D. Ga. 1975), *rev'd on other grounds* 487 F.2d 680 (5th Cir. 1973).

(c) *Uniform Code of Student Conduct:*

To further illustrate the court's attentiveness to details prior to fashioning our remedial decree and our concern with the Detroit Board's implementation efforts, we briefly trace the implementation to date of the Uniform Code of Student Conduct. As a consequence of our inquiry during the February 19, 1976 conference on vocational education, it became apparent that the Detroit Board was not in compliance with our October 29, 1975 order to implement the code of conduct. It was on that date that we ordered the Detroit Board to implement the code in all schools in the district at the start of the 1976 winter semester, to print the code in an appropriate and attractive form, to distribute the code to all students and parents in the Detroit school district, to post the code on the bulletin board in every [7] school, to prepare uniform reporting forms for every school, to assure uniform reporting of all infractions, and to devise an appropriate in-service training program for all school personnel. Notwithstanding these directives, the Detroit Board only printed 100,000 copies of a partial code, making impossible complete and uniform distribution to the 247,000 students in the system. As a supplement to this printing, the Detroit Board distributed a "highlights sheet" that omitted the introduction, critical portions of the section entitled "Disciplinary Actions" and several appendices, which distorted the code and directly contravened the order.

We gave the Detroit Board ample time to properly plan for and implement this component. As early as July 3, 1975, we expressed our view that this component required a high priority. In our August 15, 1975 Memorandum Opinion, we agreed with plaintiffs that:

"[n]o violence whether against person or property, will be allowed to impede the implementation of the desegregation process. Both students and teachers must feel secure in their person and in their ability to perform their respective functions without fear of undue and unnecessary disruption." (402 F.Supp. at 1142.)

Indeed, the experiences in the Detroit schools since the implementation of the desegregation plan, on January 26, 1976, should clearly demonstrate to the Detroit Board that uniform application of a code of student conduct is essential in a school system undergoing desegregation. We reminded the Detroit Board that without uniform application of the code, it cannot discharge its responsibility to create and maintain an appropriate educational environment. Without proper discipline, a school system [8] cannot generate academic success, self-respect or self-control. Studies have established that behavioral patterns improve with academic achievement. Thus, the success of a school system is directly related to its demands for acceptable behavioral and academic achievements. A school system that neglects to make uniform demands upon its students, demeans its enrollment. That educators and board members do not insist upon uniform academic and behavioral standards is equally degrading. Such a condescending attitude instills in black students the feeling that they are unworthy of achieving behavioral and academic standards, that a system that is predominantly black need not maintain discipline when white counterparts are not present, and that black students are incapable of shaping their own destinies or meeting disciplinary standards. A school system that relies on locked classroom doors to deliver educational services cannot succeed.

We also have indicated our concern that the code be administered in keeping with the due process provisions enunciated therein. We required that the Detroit Board ascertain that administrators submit complete and detailed reports of all student infractions and disciplinary procedures that followed, giving rise to the need for uniform reporting forms. We advised the Detroit Board of our awareness that some administrators have in the past embellished or toned down behavioral infractions. We made known to the Detroit Board our view that fair and uniform enforcement of the code could not be achieved without an appropriate in-service training program. We required that the Detroit Board devise an

in-service training program to familiarize all members of the staff with the content of the code and to train them to ensure uniform application and [9] reporting. The Detroit Board has not developed or even planned such an in-service training program. As a consequence, the code is not applied uniformly in all regions; neither has the code even been adopted by all regions.

Because it was not until late in the school term that the court was made aware of the haphazard manner in which the code of conduct has been implemented, we elected to delay hearings designed to assess the responsibility for this result. However, we remind the Detroit Board that it is an ongoing responsibility of the Monitoring Commission to scrutinize closely the implementation of the code. Should the irregular pattern of the implementation of the code itself or neglect in developing the in-service training program that we ordered in connection therewith continue into the September 1976 school term, the time will be more appropriate to hold hearings to determine whether the responsibility for the contravention of the court's order falls upon members of the Central Board of Education, the Central staff, the Regional Boards of Education, or Regional staff members. We take note that due to the structure of the regional system, the school system is still subject to varying philosophies and policies that can have a divisive effect on other educational components, as well as the uniform code of conduct.

(d) *Detroit's Regional System:*

This school system's regional structure evolved from the provisions of Act 48 of the Public Acts of 1970 (MCLA 388.171, *et seq.*). It was that Act that divided the city into eight regions, made provisions for drawing regional lines, provided for five-member regional boards, reduced the central board membership to [10] five and provided for membership on the central board for the highest vote-getter in each region, thus creating a central board controlled by members who are not accountable to voters city-wide. When the Michigan legislature was considering the passage of Act

48, the school system had been attempting to decentralize pursuant to the mandate of Public Act 244 of the Public Acts of 1969. The then Detroit Board of Education, already on record favoring decentralization, insisted that the regional boundary lines when drawn under the provisions of Public Act 244 serve to desegregate the school system as well as decentralize.

The Detroit Board's effort to include desegregation in the decentralization process met with widespread opposition. A large segment of the white community would not accept decentralization that included desegregation if it would require sending children beyond their neighborhood schools. On the other hand, a vociferous group in the black community opposed to integration insisted that decentralization provide for black control over black schools, thus injecting the concept of community control over schools in the system. These conflicting concepts brought about a near community confrontation. Under mounting community pressure, the Michigan legislature passed Public Act 48 as an attempt to compromise these competing community goals.⁸ Thus, the Detroit school system functions today under legislation conceived in controversy and without public hearings, legislative analysis, clearly defined goals for decentralization or a consensus concerning the most efficient way to administer a decentralized system.

[11] The remedial hearings gave the court an occasion to examine the educational system created by that ill-conceived act. In our Memorandum Opinion, we observed that:

The present structure . . . frustrates the achievement of educational goals common to all schools throughout the

8.

See Pindur, *Legislative and Judicial Roles in the Detroit School Decentralization Controversy*, 50 *Journal of Urban Law* 53 (1973); Grant, *The Detroit School Case: A Historical Overview*, 21 *Wayne Law Review* 851; LaNoue & Smith, *The Politics of School Decentralization*, (Chapter 7), Lexington Books, D.C. Heath & Co.

system. The system is no longer a top-to-bottom command educational organization . . . Any program designed to advance the interests of the entire system can be frustrated by any one of the eight separate regions. An edict from the top can be diluted so that by the time it reaches the lower level it has little or no impact. * * * The eight regional chairmen acting in conjunction can effectively strip the central board of all its [administrative] power. * * * Thus, Detroit voters have been bequeathed no more than a vote for a regional board in exchange for the central board. Nothing further toward achieving community control has developed in five years of decentralization. The political institution that has developed has cast a heavier financial burden upon the people of Detroit without resulting in a greater voice . . . in the operation of the school system. (402 F.Supp. at 1128.)

The structure created is chaotic and incapable of effective administration. Just as leadership and responsible administration in the process of implementation downward are impeded, so too are reporting and accountability upward similarly impeded. Regional administrators must serve two opposing masters; they are torn between accepting direction from the central administration and the regional boards that control their continued employment. As a result, the general superintendent has little direct authority. He too must respond to a board that is controlled by regional chairmen and must, of course, display the same deference as regional personnel. The ultimate result is indecision, indirection, inability to make critical decisions, and a total absence of central staff leadership or guidance.

[12] We have noted recently that the central administration has not even been able to acquire accurate enrollment figures. This is due not only to the lack of top-to-bottom command but also to the fact that financial assistance to the regions is based upon school enrollment figures, rather than local public school census data as it formerly was. Because to pad or

obscure regional enrollment figures is in the interest of local regional boards, we have observed the regions become so bureaucratized that they dare to resist the imposition of controls, direction or demands from without. We have already said: "Rather than decentralizing to disperse bureaucratic authority, the Detroit Schools have developed another completely bureaucratized political institution: the regional boards of education." (402 F.Supp. at 1127.)

As a further consequence of the regional structure, the people, to whom the school system belongs, are unable effectively to control the system. At the inception of decentralization, only the regional superintendent and his or her assistant were hired by local regional boards. Today, however, each regional bureaucracy can distribute local board patronage to fill as many as 15 administrative positions.⁹ It is apparent that the local boards have diverted resources that would otherwise have been available for educational purposes to build new offices and other facilities to house this administrative overload. Studies have not been made available to determine the amount of duplication between regional offices and the services provided by the central [13] staff or accurately to estimate the cost of this chaotic structure. However, our conservative estimate is that its costs to Detroit citizens exceeds \$8 million annually.

In addition to the administrative chaos, we know of no other school system that is so enmeshed in politics. In the up-coming election, the people of Detroit must choose

9.

For example, Region One has three regional assistants and an administrative assistant (to whom does not appear). In addition, there is a "regional physical plant manager", a "public budget administrator", a "personnel administrator", a "school-community relations director", a "Chapter III administrator", a "Title I administrator", an "achievement specialist", a "school social worker", and "attendance center" and a "psychologist" — a total of 15. The other regions are comparable, having between 13 and 16 persons. See 1974-1975 Directory of Detroit Public Schools.

among 96 candidates. Such a proliferation of positions and candidates creates great difficulty in eliminating the unqualified and those incapable of offering meaningful leadership and in weeding from the candidates those who seek positions on the board solely to gain an opportunity for higher political office. A candidate is assured a seat on the central board and an opportunity to gain city-wide attention merely by gaining the most votes in a region. The ultimate result may well be a board of education consisting of members possessing no experience in education. Qualified educational leaders are deterred from seeking positions on a board that is dominated by political maneuvering.

We have observed that like other political officers, regional board members tend to shy away from difficult decisions that might displease various segments among their constituents. For the past several months, because of the impending elections, the system has been suffering from political paralysis. Rather than devoting themselves to the educational system and the desegregative process,¹⁰ board members are busily engaged in politics not only to assure their own re-election but also to defeat others with whom they disagree. Through it all voter apathy is encouraged by the [14] regional system itself, which creates a central board controlled by members who are not elected by a direct vote.

The system has failed because it is based on the unrealistic expectation that representatives who serve only regional interests can decide issues that effect the school system as a whole. The Detroit school system has lived with this experiment for six years. In our view, the time has come for the Michigan legislature to take a fresh look at the structure created by Act 48. This structure has left Detroit with an inefficient bureaucracy at a price it can ill-afford.

10.

For example, we have seen a Region Seven Board Member who, wearing two hats, thinks it conscionable to take an oath of allegiance to the educational system and at the same time finds no conflict with that oath to advocate boycotting schools undergoing desegregation.

[15] (e) *Remedial Educational Components:*

We have indicated that the judgment we enter today will provide for quality education components we think essential to a system undergoing desegregation. We find it necessary to comment upon some of those components.

1. *Reading* — On December 4, 1975, this court ordered into effect a comprehensive program of reading instruction for the Detroit school system. In that order, we reiterated our previous findings that such a program is necessary to eradicate the effects of past segregation, and thus deserves top priority in a school system undergoing desegregation. We approved a plan that had been submitted pursuant to prior court orders, which plan included, *inter alia*, in-service training of reading instructors, the necessary administrative staff to supervise a comprehensive reading program, and the evaluation, monitoring, record-keeping and reporting necessary to ensure the successful functioning of such a program.

Reports submitted by the Reading Subcommittee of the Monitoring Commission indicate that progress on implementation of the reading program is well under way. The Commission has also submitted several recommendations with which we concur, and which we order into effect today. First, the Commission recommended amending the reading program to provide the means to deal with the discovery of perceptual difficulties among school children, a problem that often leads to learning difficulties, behavioral problems, and ultimately, failure in the school system. The Commission's recommendation was that the program provide adequate professional vision and hearing screening, and in-service training enabling [16] teachers, first, to determine, whether such screening is necessary for students and second, to apply appropriate teaching strategies to accommodate perceptual difficulties. The Commission's other recommendations included requiring the Board to specify how the mass media and community components will be utilized to reinforce the reading process, expanding the plan so as clearly to specify program design as it relates to program objectives, and

providing a process by which data from the reading program will be collected, assessed, and brought to the Monitoring Commission on a regular basis. We likewise find these recommendations valuable and order them into effect today.

2. *In-Service Training* — Throughout the course of this remedial litigation, we have stressed the importance of in-service training to enable teachers, administrators and staff to function in a desegregated setting. The importance of such in-service training is illustrated by the fact that several components that we have ordered include specific provisions for in-service training to enhance delivery of the quality education offered by those components.¹¹

In our August 15, 1975 Memorandum Opinion, we observed that "[a] comprehensive in-service training program is essential to a system undergoing desegregation." 402 F. Supp. at 1139. We pointed out that teachers' attitudes toward students are often affected by desegregation, and that these attitudes can play a critical role in the atmosphere of a school and can affect a student's academic performance.

[17] On September 19, 1975, we received the Detroit Board of Education's proposed in-service program. We have examined this proposal and find that it conforms with the requirements of our August 15, 1975 memorandum and order. Accordingly, this program is today ordered into effect. We note that the in-service training dealt with in this program is not designed to aid in the implementation of other components in the desegregation plan, but is designed to aid in the desegregation process itself.

3. *Counseling and Career Guidance* — In our August 15, Memorandum and Order, we observed that:

"School districts undergoing desegregation inevitably place psychological pressures upon the schools affected.

11.

For example, provisions for specific in-service training was made to implement the reading program and the uniform code of conduct. See our Memorandum and Order of October 29, 1975 at page 4.

Counselors are essential to provide solutions to the many problems that result from such pressure." (At p. 113.)

While the establishment of an effective counseling and career guidance program is the responsibility of every school district, its importance is even greater in a district undergoing desegregation. A comprehensive counseling program can serve as an effective vehicle for repairing the effects of past discrimination. It can aid in the creation of an environment in which children of all races not only attend school together but also learn to understand, respect and appreciate each others' cultures. For this reason, no quality education component is more directly related to the desegregative process than counseling and career guidance. Accordingly, we directed the Detroit Board to submit a counseling and career guidance plan.

After careful examination of the plan submitted, we requested the Counseling and Career Guidance Subcommittee of the Monitoring Commission to submit a critique of that proposal. [18] That critique received the approval of the Commission's Advisory and Technical Professional Staff and Executive Committee. We agree with the observations contained in the March 30, 1976 report of the Counseling and Career Guidance Subcommittee that the Detroit Board's plan is basically sound and reflects pupil needs. The Subcommittee's report wisely points out the need for an in-service training program to ensure successful counseling and guidance services. Further, the report recommends "establishment of a Community Guidance Advisory Committee in each school for the purpose of establishing, discussing and modifying policies with respect to guidance and counseling. Experience has shown that such committees are of great value in gaining and building community support."

Accordingly, the judgment we enter today requires that the Detroit Board's September 30, 1975 submission, as

modified by the Monitoring Commission's Counseling and Career Guidance Subcommittee March 30, 1976 report, be implemented by the joint efforts of the defendants Detroit Board of Education and the State Board of Education.

4. *Testing* — In our memorandum opinion of August 15, 1975, we found that the assurance that tests administered to students are free from racial, ethnic and cultural bias is of great importance to a system undergoing desegregation. Accordingly, we ordered that the Detroit Board of Education and the State Board of Education devise a plan for the implementation of a testing program that eliminates all vestiges of discrimination. Pursuant to court orders, a testing plan was submitted by the two Boards of Education on [19] September 8, 1975. We have examined this plan, and find that it is appropriate for implementation in a desegregated school system.

Accordingly, our order will require that the Detroit Board of Education shall forthwith review all tests currently in use in the Detroit public schools, shall determine whether such tests are "culture-fair," and shall eliminate any racial, ethnic and/or cultural bias inherent in any testing apparatus used in the Detroit school system. The Board shall also review and revise all instructions and procedures currently used for the administration of tests to students, to ensure that said instructions and procedures are non-discriminatory. Moreover, as part of its in-service training program, the Detroit Board of Education shall develop and institute a program to train teachers and administrators in test administration procedures designed to ensure non-discriminatory treatment of students.

The testing plan will also require that the Detroit Board of Education establish an evaluation program to include all students in its schools. This program shall be directed toward evaluating the effectiveness of instructional programs and using evaluations for curriculum development and for planning and policy determinations

by the Detroit Board of Education. The Detroit Board shall also design, develop and institute an objective-referenced capability including the establishment of systemwide performance objectives and the development of objective testing procedures to measure growth for each performance objective.

5. *School-Community Relations* — In our Memorandum Opinion of August 15, 1975, we indicated the importance that we place upon school-community relations and parent involvement. At that time [20] we agreed with the plaintiffs that "an acceptable community relations plan should include provisions for school-community liaison and parental involvement." We added that:

"[a]n effective community-relations program must develop a partnership between the community and the schools and must cooperate with traditional groups such as PTA organizations and local school advisory boards. There should be a cooperative flow of information from the school to the community and from the community to the school. Open and free discussion and participation in the desegregation process should be encouraged. The school-community relations organization should receive complete encouragement, budgetary support, direct assistance and a free flow of information from school authorities." (Memo. Op. 8-15-75 at 111.)¹²

Thus, our memorandum opinion set forth the guidelines for an acceptable school-community relations (parental involvement) program. We again emphasize that the program must develop a "partnership between the community and the schools." Accordingly, our judgment will require that the

12.

We have indicated that we disapprove of compensation for participation in the school-community relations component. We are not aware that compensation is still offered, and until we are informed otherwise, we do not make compensation a subject of our order.

Detroit Board create and implement the following school-community relations (liaison-parental involvement) component:¹³

A. Local School-Community Relations Committees

The school board staff shall organize a local school community relations committee *in each school*. Each committee shall be composed of 20 persons and should reflect the racial composition of the school population as closely as possible. Each committee shall include school personnel, students and representatives [21] of the community. Ten members shall be drawn from the community. While community members may be drawn from organizations such as the local PTA and PTO, at least two such representatives must be unconnected with existing school organizations. Moreover, for those schools to which students have been assigned for purposes of desegregation, at least two parents of those reassigned children must be selected. Each committee shall elect a chairperson and develop procedural rules to govern its sessions.

The purposes of the establishment of local committees are to strengthen communication between school personnel and parents, to encourage parental involvement in school affairs, and to increase understanding among parents from different communities. It is our hope that the committees will aid in resolving conflicts arising from the desegregation process. The local communities must attempt to deal with the concerns of parents whose children are being transported to the school or have been reassigned by boundary changes to aid desegregation. If the local committee is unable to resolve any problem, whether created by desegregation or not, it should seek the assistance of its regional committee or the system-wide school-community relations council.

13.

It is anticipated that the school board will utilize existing programs and adapt those portions of its September 30, 1975 submission that best supplement the program we outline here.

B. Regional School-Community Relations Committees

Each region shall organize a regional school-community relations committee to coordinate the efforts of the local committees. The regional committee shall be composed of representatives selected from the local committees. A chairperson shall be appointed by the regional board of education. Meetings shall [22] be held monthly in a facility selected by the regional board, and the regional board shall provide a secretary.

The function of the regional committees is to discuss problems arising in the desegregated schools, such as discipline and academic achievement, to develop programs designed to resolve those problems, and to report to the local committees on the progress achieved by other local committees in solving any of these problems. Such discussions can enable local committees to benefit from each other's experiences. The committee shall further advise the regional board of the overall success of desegregation within the region and forward suggestions to facilitate desegregation to the regional board of education and the city-wide community relations council.

C. School-Community Relations Council

A city-wide school-community relations council shall be established to oversee the entire program. The council shall consist of 10 persons selected by the General Superintendent and 10 persons selected by the court's Monitoring Commission. In addition, the council may desire to draw additional members from such organizations as New Detroit, NAACP, the Chamber of Commerce, the League of Women Voters, the Coalition for Peaceful Integration, etc.

In addition to establishing and coordinating programs to be implemented by the local committees, the council shall attempt to resolve, by mediation, conflicts that cannot be resolved by the local or regional committees. It shall actively

seek input from local committees concerning the success of desegregation, and forward both complaints and suggestions for improvement to [23] the central board staff, the parties and the court's Monitoring Commission. It shall further develop and evaluate local and regional committee programs and procedures, develop an agenda for local and regional committees and furnish the committees, school boards, and superintendents with recommendations to avoid duplications and improve the program's effectiveness. The council, with the cooperation of local committees, shall compile reports detailing the efforts of regional and local committees, to be submitted to the court's Monitoring Commission.

The council shall organize the following subcommittees:

(1) *Public Information* — To disseminate to the public accurate information concerning implementation of the desegregation plan, and any other information about the school system of public interest.

(2) *Monitoring* — To evaluate efforts of local and regional committees and provide a monthly report detailing such efforts to the school-community relations council and the court's Monitoring Commission.

(3) *Local Committee Liaison* — To work with local committees to establish and implement programs designed to relieve racial tensions. The subcommittee shall also consider suggestions for improving the desegregation process and handle grievances of the local committees through mediation. Unresolved problems should be forwarded to the appropriate central board personnel and the Monitoring Commission of the court.

(4) *Community Liaison* — To conduct liaison with business, religious, labor, neighborhood and civic groups, [24] develop an understanding of the desegregation plan, obtain assistance in implementing the plan, develop interest in and cooperation with the school system and coordinate the interest and work of such groups as the PTA's and PTO's.

(5) *Parental Involvement* — To encourage and develop programs for local and regional committees designed to generate parental involvement in community schools.

(6) *Executive Committee* — To conduct council business between sessions. This committee shall be composed of the council and subcommittee chairpersons.

The council shall meet in open session at least once a month; agendas of council business shall be prepared in advance. Subcommittees shall be convened twice a month. Necessary secretarial personnel shall be provided by defendant Detroit Board of Education. The Community Relations Service of the Department of Justice will provide assistance to the council and a representative of the Community Relations Service shall attend council and executive sessions.

Further, the executive committee of the council shall meet monthly with the General Superintendent of schools and a representative of the Monitoring Commission to discuss overall progress in implementing this program for school-community relations and the resolution of unsolved problems.

[25] (f) *Conclusions:*

The judgment entered on this date will provide the Detroit Board of Education with sufficient lead time to plan for and implement the components mandated. Besides adding several new components, we have sought to strengthen those programs now in existence. In entering our judgment today, we acknowledge our awareness that this litigation must be finalized. The school system must be afforded the opportunity to devote its energies to perfecting the education of Detroit school children, something it has not been able to do since this litigation began. The entry of our judgment today should also advise a troubled community that the court is indeed concerned with the quality of education in a system undergoing desegregation. The school district must, if

necessary, adjust its priorities to accommodate the cost of the educational components mandated so that the children of Detroit will reap the benefits of a greatly improved educational system. It is our hope that the judgment, together with the numerous orders we have previously entered, will provide the community and the school system with an opportunity to fulfill their educational aspirations.

We recognize that both the community and the school district have demonstrated great patience. Admittedly, the desegregative process has been slow in developing. The transition to a unitary system has required that we proceed with great care and caution, especially in view of the practicalities we have taken into account. We also hope that the Michigan legislature will re-examine Act 48 and provide the Detroit school system with a structure that is administratively efficient, less expensive [26] and less cumbersome, and provides an essential top-to-bottom command, while at the same time providing for community involvement in the decision-making process. We are equally confident that the Detroit community will continue its support for the desegregation effort and that a quality desegregated school system will evolve as anticipated in our August 15, 1975 Memorandum Opinion.

NOW, THEREFORE, IT IS ORDERED that the Detroit Board of Education forthwith print a sufficient number of copies of the Uniform Code of Student Conduct in an appropriate and attractive form for distribution as provided in our October 29, 1975 order;

IT IS FURTHER ORDERED that the Detroit Board of Education forthwith develop and implement an appropriate in-service training program that meets the requirements of our October 29, 1975 order;

IT IS FURTHER ORDERED that the Detroit Board of Education shall, not later than August 4, 1976, submit a report to the court detailing the manner and results of compliance with each and every provision in our October 29, 1975 order.

ROBERT E. DeMASCIO /s/
Robert E. DeMascio
United States District Judge

Dated: May 11, 1976

APPENDIX**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al., Plaintiffs,	Civil Action No. 35257
v.	
WILLIAM G. MILLIKEN, et al., Defendants.	

**STIPULATION BY DEFENDANT DETROIT BOARD OF
EDUCATION AND DEFENDANT STATE BOARD OF
EDUCATION WITH RESPECT TO THE ESTABLISHMENT
OF VOCATIONAL EDUCATION CENTERS**

Defendant Detroit Board of Education and defendant State Board of Education, by their respective attorneys, hereby stipulate and agree as follows:

1. Under date of October 3, 1975, said defendants submitted to the Court a revised joint plan for the establishment by the Detroit Board of Education of area vocational education centers in Detroit.

2. For the purpose of effectuating the establishment of area vocational education centers in Detroit, each defendant board of education adopted a motion(s) at its respective meeting held on February 24, 1976. A copy of the motion adopted by the State Board of Education is attached hereto as Exhibit A and made a part hereof. A copy of the motions adopted by the Detroit Board of Education is attached hereto as Exhibit B and made a part hereof.

3. Each board of education will implement the undertakings set forth in its motion(s) (Exhibits A and B). In the implementation of such undertakings, each board of education will act pursuant to and will comply with all applicable state and federal statutes, rules and regulations.

[2] 4. The location of the site for each vocational education center, the construction of such center (whether it be by new construction, the renovation of a building now owned by the Detroit Board of Education, or by the acquisition and renovation of an existing building), and the assignment of pupils to each vocational education center will be subject to the prior approval of the Court.

5. Title to the area vocational education centers shall be vested solely in the Detroit Board of Education and such centers shall be owned solely by the Detroit Board of Education.

RILEY AND ROUMELL

By:
GEORGE T. ROUMELL, JR. /s/
George T. Roumell, Jr.

By:
JANE K. SOURIS /s/
Jane K. Souris

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Lansing, Michigan 48913

Dated:

EXHIBIT A

February 24, 1976

Allocation of Federal Vocational Education Funds for the Construction of Five Vocational Centers Under Order of Judge Robert DeMascio

Ms. Kelly moved, seconded by Mrs. Miller, that the State Board of Education resolve to provide 50 percent of the construction cost of the five area vocational centers which Judge Robert DeMascio has ordered be constructed in the Detroit School System and, further, that the State Board of Education advise staff to submit to it a revised State Plan for Vocational Education for its approval and submission to the Office of Education. Approval of the revised Plan is a condition precedent to acceleration of the construction schedule of the five area vocational schools. It is the intent of the Board that the construction of the Detroit vocational centers be accomplished if possible within a three-year period. The foregoing is contingent upon the following provisions: (1) that the Detroit Board of Education commit 50 percent of the construction costs of the aforesaid vocational centers, (2) that sufficient funds, primarily federal vocational funds, and if possible, additional funds be available to the Board for allocation under this provision, and finally that the Detroit Board of Education comply in all steps of construction of these centers with all applicable state and federal statutes, rules and regulations as the same pertain to each area vocational center being constructed or constructed in the past.

Ayes: Dumouchelle, Henry, Kelly, Miller, Riethmiller,
Stockmeyer
Nay: Vandette
Absent: Roberts

The motion carried.

EXHIBIT B**REPORTS FROM THE GENERAL SUPERINTENDENT****Area Vocational Centers**

Superintendent Jefferson reviewed for the information of the Board that pursuant to a Court Order, hearings were commenced February 17, 1976 in the Federal District Court regarding the funding of the Area Vocational Centers. Following two days of the hearings, Judge DeMascio ordered counsel for the defendants and the plaintiffs; State Superintendent of Public Instruction, Dr. Porter; the President of the State Board of Education; the President of the Detroit Board of Education, who was represented by the Vice President of the Board and the Chairman of the Finance Committee; and Superintendent Jefferson to meet in his chamber on February 19. During the course of that meeting the financial implications of the vocational education component previously ordered by the Court November 10, 1975 were discussed. In the course of these discussions it was agreed by State Superintendent Porter and Superintendent Jefferson to make the following recommendations to their respective Boards regarding financing of the area vocational centers.

It is recommended that the Detroit Board of Education agree that the Detroit Public Schools will pay 50% of the total cost of the construction, acquisition, and/or renovation of area vocational centers to meet the educational specifications necessary to provide employable skills to approximately 10,000 students in the Detroit School System. This agreement is contingent on the State Board of Education also agreeing to pay 50% of the total cost of these area vocational centers. It is further stipulated these funds must be made available with a maximum of a five-year period.

Superintendent Jefferson requested Board approval of the recommendation.

It was moved by Member McFadden, supported by Member Kennedy, that the Board approve the recommendation of the Superintendent.

Carried.

(Member McDonald entered the meeting.)

Superintendent Jefferson further stated that one of the area vocational centers to be constructed or acquired and renovated will devote most of its activities to the development of construction trades skills and competencies with minor emphasis on the manufacturing trades. He said both the Detroit Board and staff recognizes that it would constitute a gross disservice to the students and the City of Detroit if a vocational education area center [2] specializing in the construction trades were to become operational without specific agreements having been reached between the construction trades unions and the school system which stipulate that any qualified graduate of the center would be assured entry into the apprenticeship program of the construction trades. The Detroit Board of Education articulated the need for such agreements in its joint submission to the Court dated October 3, 1975. Superintendent Jefferson said that need is reemphasized again today and, with this in mind, the following recommendation is submitted for approval:

Prior to initiating the construction, acquisition, and/or renovation of a construction trades area vocational center, the Board of Education must have assurances from the various trade unions that its qualified graduates will be accepted for employment. Therefore, it is recommended that the Detroit Board of Education instruct its counsel to take whatever steps are necessary to obtain assistance from the Federal Court in achieving these agreements.

It was moved by Member Murray, supported by Member Jordan, that the Board approve the recommendation of the Superintendent.

Carried.

President Golightly, in commenting with regard to the vocational education component, expressed the hope that the Board of Education and administration would be continually aware of the necessity of keeping the academic quality of a total high school program so that the students who go through these vocational centers and choose careers that require going on to college would have the opportunity to do so.

Dr. Jefferson reaffirmed that it was not the intent of staff to develop any program that would limit any student or that would meet the needs of only a selected few. Any vocational/technical programs that are instituted in the school system will be available to all students regardless of what their professional life aspirations are. The Superintendent noted also that this is the first educational component ordered by the Court; however, it should not be construed that it is the first in importance. Staff is equally concerned about the other educational components — reading, bilingual, in-service, counseling and guidance, and all those that were part of the August 15, 1975 Order. He said that with the support of the Board, staff would continue to press toward getting these programs implemented also.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**RONALD BRADLEY, et al.,
Plaintiffs,**

v.

**WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants.**

**Civil No.
35257**

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law contained in our August 15, 1975 Memorandum Opinion and pursuant to the Memorandum and Order filed this date;

IT IS ORDERED AND ADJUDGED that:

This court's November 4, 1975 order to implement a student reassignment plan shall continue in effect until modified or otherwise made the subject of a subsequent court order;

PROVIDED, HOWEVER, that on or before August 16, 1976 the defendant Detroit Board of Education shall submit an amendment to the November 4, 1975 desegregation plan in conformance with the foregoing requirements;

a) Said amended plan shall, where feasible, further compliance with the court's guidelines, the August 15, 1975 Memorandum Opinion and Partial Judgment, and all other orders of this court with respect thereto;

b) Said amended plan shall include a report disclosing accurate demographic data;

[2] c) Said amended plan shall include a list of all schools disclosing therefor the number of students black and white attending each school and the official capacity for each school, and

d) Said amended plan shall provide that student enrollment does not exceed official capacity at any school;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education shall proceed forthwith to take all steps necessary to equalize all school facilities and buildings preparatory to the September 1976-1977 school term;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education shall continue the comprehensive construction and renovation program as mandated in this court's August 15, 1975 Partial Judgment (pp. 13-14) as amended (Oct. 24, 1975) and consistent with subsequent court orders related thereto;

IT IS FURTHER ORDERED AND ADJUDGED that:

The defendant Detroit Board of Education and the state defendants shall, on or before the start of the September 1976 school term, institute comprehensive programs for:

- a) Reading and communication skills
- b) In-service training
- c) Testing
- d) Counselling and career guidance

PROVIDED, HOWEVER, that the Detroit Board shall disclose to the state defendants its highest budget allocated in any year for each of these above-enumerated quality

education programs [3] ordered herein, and thereafter the state defendants and the Detroit Board shall compute the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs, and the state defendants and the Detroit Board shall thereafter equally bear the burdens of such excess cost imposed by the provisions contained in this judgment and previous orders directing implementation of said educational components consistent with all orders and memoranda relating thereto;

PROVIDED FURTHER, HOWEVER, that the state defendants and the Detroit Board shall take all necessary steps to utilize existing funds already allocated or to be allocated and by reallocating existing or new funds, and shall thus provide for the full implementation of the educational components ordered herein commencing with the 1976-1977 school term;

PROVIDED FURTHER, HOWEVER, that the Detroit Board shall take steps forthwith to adjust its priorities for the 1976-1977 budget to further assure the implementation of the educational components mandated herein;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education and the state defendants shall institute a vocational education program consistent with all the memoranda and orders heretofore issued by the court and pursuant to the stipulations and resolutions submitted by each defendant board, which are attached as an appendix to the memorandum filed this date;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education shall institute a comprehensive program for bilingual/multi-ethnic studies that [4] complies with state requirements as contained in MCLA §§340.360, 340.390-395;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education shall institute and implement each and every provision relating to the Uniform Code of Student Conduct consistent with each and every order relating thereto;

IT IS FURTHER ORDERED AND ADJUDGED that:

The Detroit Board of Education shall forthwith institute a comprehensive school-community relations (parental involvement) program as provided in the memorandum filed this date and each and every previous memorandum and order relating thereto;

IT IS FURTHER ORDERED AND ADJUDGED that:

The state defendants shall continue to provide the monitoring services until further order of the court;

IT IS FURTHER ORDERED AND ADJUDGED that:

1) The court's jurisdiction in this cause shall be continuing and the parties hereto shall be subject to change orders filed pursuant to the court's jurisdiction;

2) All previous orders of the court, not inconsistent with this judgment, shall remain in full force and effect unless amended or modified by the court in furtherance of its jurisdiction or upon motion of any party and all such previous orders shall be incorporated in this judgment as though fully set forth;

IT IS FURTHER ORDERED AND ADJUDGED that:

The defendants Detroit Board of Education, the General Superintendent therefor, his administrative staff, the Regional [5] Boards and each Board member thereof, the Regional Superintendent, his staff and all other administrative personnel, the State Board of Education and each member

thereof, the Superintendent of Public Instruction, the Attorney General, the State Treasurer, and officers, agents, servants, employees and attorneys and all other persons in active concert or participation with them who receive notice of the court's orders are **HEREBY ORDERED** to implement the provisions of this judgment and to comply with each provision contained herein.

**ROBERT E. DeMASCIO /s/
Robert E. DeMascio
United States District Judge**

Dated: May 11, 1976

Nos. 75-2018, 75-2295-96, 75-2443,
76-1635, 76-1678

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**RONALD BRADLEY, et al.,
Plaintiffs-Appellants,**

v.

**WILLIAM G. MILLIKEN, Governor
of Michigan, et al.,
Defendants-Appellees and
Cross-Appellants,**

**Board of Education of the City
of Detroit,**

**Defendants-Appellees and
Cross-Appellants,**

**Detroit Federation of Teachers,
Intervening Defendant and
Cross-Appellant.**

**Appeal from the
United States
District Court
for the Eastern
District of
Michigan.**

Decided and Filed August 4, 1976.

Before: PHILLIPS, Chief Judge, and EDWARDS and
PECK, Circuit Judges.

PHILLIPS, Chief Judge. When this school desegregation
case was filed in August 1970, Ronald Bradley, one of the

black plaintiffs, had been assigned to enter the kindergarten of a Detroit school whose enrollment was 97 per cent black. [2] There have been numerous court proceedings since that time, culminating in the opinion of the Supreme Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), reversing the en banc decision of this court reported at 484 F.2d 215 (1973). The Supreme Court remanded with directions for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." 418 U.S. at 753.

This court now reviews appeals and cross-appeals from various orders and decisions of the District Court, two of which are reported at 402 F.Supp. 1096 (1975) and 411 F.Supp. 943 (1975).

In September 1976 Ronald Bradley is scheduled to enter the sixth grade of the Clinton School, which now is more than 99 per cent black.¹ The decisions of the District Court which we now review do nothing to correct the racial composition of the Clinton School. They grant no relief to Ronald Bradley nor to the majority of the class of black students he represents.

Nevertheless, this court finds itself in the frustrating position of having to leave standing the results reached by the District Judge on the issue of assignment of students, although we disagree with parts of his opinions and orders. Our affirmance is found to be necessary for the simple reason that reversal would be an exercise in futility under the situation now existing in the Detroit school system and the law of this case as established by the Supreme Court in *Milliken v. Bradley*.

Other questions raised by the appeals of various parties will be discussed later in this opinion.

1.

The charts submitted by the Detroit Board show the Clinton School to be 100 per cent black.

I. Prior Findings as to Constitutional Violations

This litigation had its genesis under modest circumstances. On April 7, 1970, before the filing of any suit, the Detroit Board [3] of Education on its own initiative adopted a plan to effect a more balanced distribution of black and white students in 12 of the 21 Detroit high schools. The April 7 plan was to take effect over a three-year period, applying initially to those students entering the tenth grade in September 1970. In the eleventh grade the plan was to have been effected at the opening of the 1971-72 school year and the twelfth grade at the beginning of the 1972-73 school year. The plan was designed to reduce segregation in a school system that then was 63.6 percent black.

On July 7, 1970, however, the Governor of Michigan signed into law Act No. 48, Public Acts of 1970. Section 12 of this Act had the effect of delaying and ultimately blocking the implementation of Detroit's April 7 plan. The four members of the Detroit Board of Education who supported the April 7 plan were removed from office through a recall election. Four new members were appointed by the Governor of Michigan. These four members, together with the incumbent members, who had opposed the April 7 plan from its inception, thereafter rescinded it.

The complaint in the present case was filed August 18, 1970. Among other things, the complaint prayed for a preliminary injunction requiring defendants to put into effect the plan adopted by the Detroit Board of Education on April 7 and restraining the defendants from giving any force or effect to § 12 of Act 48 insofar as it would inhibit immediate implementation of the April 7 plan. On September 3, 1970, the late District Judge Stephen J. Roth denied plaintiffs' application for a preliminary injunction. Plaintiffs immediately filed a notice of appeal and a motion in this case for injunction pending appeal.

On September 8, 1970, the day of the opening of the 1970-71 Detroit school term, the Chief Judge of the Sixth

Circuit heard oral arguments on the application for an injunction to place the April 7 plan in effect pending appeal. The Chief Judge entered [4] an order denying the application for injunction pending appeal and advanced the case on the docket of this court for argument on its merits. In an opinion announced October 13, 1970, reported at 433 F.2d 897, this court held § 12 of Michigan Act 48 to be unconstitutional, ruled that the District Court did not abuse its discretion in denying the preliminary injunction and remanded the case for a trial on the merits. On remand, the District Court again refused to put the April 7 plan into effect. The plaintiffs moved for summary reversal or injunction pending appeal. In an opinion reported at 438 F.2d 945 (1971), this court again remanded the case to the District Court for a hearing on the merits.

After extensive hearings, Judge Roth found as a fact that de jure segregation existed in the Detroit public schools. 338 F.Supp. 582 (1971). Included in his findings of fact were the following:

[W]e find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit. 338 F.Supp. at 592.

This court held that the foregoing findings of fact by Judge Roth were not clearly erroneous, Fed. R. Civ. P. 52 (a), but to the contrary were supported by ample evidence. We said:

The discriminatory practices on the part of the Detroit School Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge. 484 F.2d at 241.

The constitutional violations found to have been committed by the Detroit Board of Education are discussed in some detail at 484 F.2d 221-38. The constitutional violations found to have been committed by the State of Michigan are discussed at 484 F.2d 238-41.

[5] We do not read the opinion of the Supreme Court as disagreeing with or disturbing in any way the findings of unlawful segregation with respect to the Detroit school system. To the contrary, as pointed out above, the Supreme Court remanded the case with a mandate for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy that has been delayed since 1970." 418 U.S. at 753.

II. The Remedy

It is the law of this case that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in creating the de jure segregation which exists in the public schools of Detroit. The principal question to be resolved on the present appeal involves the remedy. District Judge Stephen J. Roth died July 11, 1974. The responsibility for providing a remedy in obedience of the mandate of the Supreme Court was assigned to District Judge Robert E. DeMascio, author of the opinions reported at 402 F.Supp. 1096 and 411 F.Supp. 943, which are involved on the present appeal.

a) Previous Efforts to Effect a Remedy

After his finding of de jure segregation, Judge Roth grappled with the problem of fashioning a remedy in accordance with *Swann v. Board of Education*, 402 U.S. 1 (1971), *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968), *Green v. County School Board*, 391 U.S. 430 (1968) and *Brown v. Board of Education*, 349 U.S. 294 (1955). Initially he contemplated a "Detroit only" solution. A motion was made to add other school districts as parties defendant. Judge Roth reserved a decision on this motion

pending submission and consideration of desegregation plans. 338 F.Supp. at 595.

Judge Roth required the school board defendants, Detroit [6] and State, to develop and submit plans of desegregation, "designed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Three "Detroit only" desegregation plans were submitted by the plaintiffs and by the Detroit Board of Education. Judge Roth found that:

[W]hile plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. . . . [R]elief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city. 345 F.Supp. at 916 (1972).

Judge Roth concluded that he had the duty to look beyond the limits of the Detroit school district for a solution to the illegal segregation in the Detroit public schools. 345 F.Supp. at 916.²

The parties submitted a number of plans of metropolitan desegregation, including six by the State Board of Education (made without recommendation), all of which were rejected. Judge Roth thereupon appointed a nine member panel "charged with the responsibility of preparing and submitting an effective desegregation plan." 345 F.Supp. at 916.

This was the posture of the decision of Judge Roth at the time four interlocutory orders were reviewed by the Court of Appeals under 28 U.S.C. § 1292 (b), together with one final

2.

The findings are quoted in full at 484 F.2d 242-45.

order relating to the purchase of school buses. No desegregation plan was ever adopted by Judge Roth or approved by this court.

As already noted, this court agreed with Judge Roth that the State of Michigan had committed acts of de jure segregation. [7] In ruling on the interlocutory appeal, we also agreed that the State controls the instrumentalities whose action is necessary to remedy the harmful effect of the State acts, 484 F.2d at 245-49, and concluded:

In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. 484 F.2d at 249.

We said:

This court in considering this record finds it impossible to declare "clearly erroneous" the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black. 484 F.2d at 249.

This court held that it would be within the equity power of the District Court to adopt a plan of desegregation extending beyond the boundaries of the Detroit School District. We remanded the case to the District Court for the taking of additional evidence because several of the suburban school districts had not been heard or had an opportunity to be heard. We held that as a prerequisite to the implementation of a plan affecting any school district, "the affected district

must be made a party to this litigation and afforded an opportunity to be heard." 484 F.2d at 250-52.³

[8] The Supreme Court reversed the decision of this court, holding that no remedy involving any school district other than Detroit would be within the equitable power of the District Court without evidence that the suburban district or districts had committed acts of de jure segregation. In his separate concurring opinion, Mr. Justice Stewart explained the grounds for reversal in this language:

In reversing the decision of the Court of Appeals this Court is in no way turning its back on the proscription of state-imposed segregation first voiced in *Brown v. Board of Education*, 347 U.S. 483, or on the delineation of remedial powers and duties most recently expressed in *Swann v. Charlotte-Mecklenburg Board of Education*, [9] 402 U.S. 1. In *Swann* the Court addressed itself to the range of equitable remedies available to the courts to effectuate the desegregation mandated by *Brown* and its progeny, noting that the task in choosing appropriate relief is "to correct . . . the condition that offends the Constitution," and that "the nature of the violation determines the scope of the remedy" *Id.*, at 16.

3.

The interlocutory decisions of Judge Roth, which were affirmed by this court, have been misunderstood and reported erroneously. It has been said that Judge Roth ordered, and this court approved, the consolidation of the Detroit School District with 53 suburban school districts, or that Judge Roth established a desegregation panel and ordered it to prepare a remedial plan consolidating the Detroit system and 53 suburban school districts. Such reports are incorrect. See, e.g., *Hills v. Gautreaux*, — U.S. —, 44 U.S.L.W. at 4480, (U.S. Apr. 20, 1976). We have found nothing in any opinion or order of Judge Roth evidencing any intention to consolidate any school districts. He apparently contemplated a remedy which would have left the suburban districts intact but would have involved one or more of them in a metropolitan plan of pupil transportation.

Moreover, this court never indicated an intention to require the consolidation of any school districts. The interlocutory order affirmed by us merely created a panel "charged with the responsibility of preparing

The disposition of this case thus falls squarely under these principles. The only "condition that offends the Constitution" found by the District Court in this case is the existence of officially supported segregation in and among public schools in Detroit itself. There were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegregation plan pupils from school districts outside Detroit was not predicated upon any constitutional violation involving those school districts. By approving a remedy that would reach beyond the limits of the city of Detroit to correct a constitutional violation found to have occurred solely within that city the Court of Appeals thus went beyond the governing [10] equitable principles established in this Court's decisions. 418 U.S. at 757.

and submitting an effective desegregation plan." So far as the record shows, this panel never made a report. It is reemphasized that no specific plan of desegregation was ever adopted by Judge Roth or approved by this court.

Apparently there has been confusion between this case and *Bradley v. School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd* by an equally divided court, 412 U.S. 92 (1973), where the District Court ordered the consolidation of three separate Virginia school districts.

This court distinguished the Detroit case from the Richmond case in the following language:

Bradley v. School Board of the City of Richmond, 462 F.2d 1058 (4th Cir. 1972), *aff'd* by an equally divided court, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973), is distinguishable in several respects. In that case the District Court ordered an actual consolidation of three separate school districts, all of which the Court of Appeals for the Fourth Circuit declared to be unitary. In the instant case the District Court has not ordered consolidation of school districts, but directed a study of plans for the reassignment of pupils in school districts comprising the metropolitan area of Detroit. In the Richmond case the court found that neither the Constitution nor statutes of Virginia, previously or presently in effect, would have permitted the State Board of Education, acting alone, to have effected a consolidation of the three school districts into a single system under the control of a single school board. The Fourth

b) The Remedy at Issue on Present Appeals

District Judge DeMascio was faced with an extremely difficult (if not impossible) assignment, confronted as he was with the responsibility of formulating a decree which would eliminate the unconstitutional segregation found to exist in the Detroit public schools, without transgressing the limits established by the Supreme Court.

Like Judge Roth, Judge DeMascio required the plaintiffs and the Detroit Board of Education to submit desegregation plans. Like Judge Roth, he rejected both plans as unsatisfactory. By his opinion of August 15, 1975, 402 F.Supp. 1096-1147, he outlined the details of this involved litigation, made findings of fact and adopted remedial guidelines. By his opinion of November 4, 1975, 411 F.Supp. 943, the District Judge adopted a desegregation plan drafted by the Detroit Board in accordance with the August 15 guidelines. Reference is made to these two opinions for a recitation of pertinent facts. Various amendatory and supplemental orders also have been entered by the District Court, which will be mentioned in this opinion only to the extent necessary to dispose of issues raised on this appeal.

The plaintiffs-appellants attack the plan as "bizarre" and urge its reversal. The Detroit Board of Education contends

Circuit held that compulsory consolidation of political subdivisions of the State of Virginia was beyond the power of a federal court because of the Tenth Amendment to the Constitution of the United States. The decisions which now are under review did not contemplate such a restructuring.

Furthermore, the court in the Richmond case cited provisions of the Constitution and statutes of Virginia in support of its holding that —

"The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education." 462 F.2d at 1067.

The record in the present case amply supports the finding that the state of Michigan has not been subject to such limitations in its dealings with local school boards. 484 F.2d at 250-51.

that the plan is constitutional and should be affirmed. The State defendants take the position that the pupil assignment plan meets constitutional requirements for desegregating the Detroit school system and should be affirmed, but contend that the District Court exceeded its authority in requiring certain "educational components" and in directing that the State pay 50 per cent of the cost of these programs.

The plan adopted by the District Court became effective as of the beginning of the winter-spring semester, 1976. As [11] of September 26, 1975, the Detroit public schools enrolled 247,774 students, 75.1 per cent of whom were black. In broad outline the plan adopted by the District Court required the reassignment of 27,524 students, of whom 21,853 would require bus transportation. The plan changed the racial balance in 105 schools out of approximately 300 zoned schools in the system. Prior to the implementation of the plan approximately 80 schools had enrollments of a majority of white students. Under the District Court's plan, 67 of these schools received black students through transportation and rezoning. The result of the student reassignments is that no school in Detroit, with two marginal exceptions, will have an enrollment of less than 30 per cent black students. Moreover, 47 of the previously white schools have become more than 40 per cent black.

In addition, 38 schools, the majority of which previously were at least 80 per cent black, received white students via transportation and rezoning. Under the plan 25 of these schools became 45 to 55 per cent black. Furthermore, at least 23 of Detroit's schools, enrolling approximately 22,599 students, contain a substantial mix of black and white students without any student reassignment.

In order to effectuate the reassignment of students, the District Court ordered the purchase of 250 school buses.⁴

4.

In an order dated June 19, 1975, published at 519 F.2d 679, *cert. denied*, 423 U.S. 930 (1975), this court modified and affirmed the order of the District Court requiring the purchase of 150 school buses. We directed that the Detroit School Board acquire the buses and that the State defendants bear the costs of acquisition to the extent of 75 per cent thereof. On October 8, 1975, the District Court ordered the Detroit Board of Education to acquire 100 additional buses, with 75 per cent of the costs to be paid by the State.

Finally, the District Court ordered the closing of certain antiquated schools, the establishment of vocational centers available on a non-racial basis to all qualifying students, and certain Educational Components, hereinafter discussed in further detail.

To the credit of the citizens of Detroit, the record discloses [12] that the court's plan, although implemented in the middle of a school year, was accepted in an orderly manner and in a spirit of community cooperation, without substantial disruption or disorder.

Although some improvements have been accomplished by the District Court, the plan contains glaring defects that could never pass constitutional muster and would not be contended by this court in a different factual situation.

As of September 1974, prior to the implementation of the plan, the percentages of black students in the eight school regions were as follows:

Region # 1	90.3% black
Region # 2	60.3% black
Region # 3	70.8% black
Region # 4	55.5% black
Region # 5	96.7% black
Region # 6	63.1% black
Region # 7	45.2% black
Region # 8	95.2% black

402 F.Supp. at 1106.

Notwithstanding the reassignments effected by the District Court, the percentage of black students in each of the eight regions remains substantially unchanged under the adopted plan. Only twelve of the 157 zoned schools with previous enrollments over 90 percent black have become under 90 percent black. Approximately half of Detroit's schools remain more than 90 percent black. Moreover, the three regions which contain the highest concentration of black

students, regions 1, 5 and 8, remain virtually untouched. This means that approximately 83,000 students are granted no relief from unconstitutional de jure segregation.

The Supreme Court has said that the existence of some one-race schools "is not in and of itself the mark of a system that still practices segregation by law." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971). We recognize that the overwhelming number of black students in Detroit and their concentration in the inner city undoubtedly makes some one-race schools unavoidable under any "Detroit only" remedy. However, when the Detroit School Board virtually eliminated regions 1, 5 and 8 from both its initial plan and the plan finally adopted, it assumed the heavy burden of justifying its elimination of the schools located in these three regions. In *Swann* the Supreme Court stated:

Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. at 26.

The Board's burden of jurisdiction is particularly heavy in this case because the three regions which the Board has left untouched, in the inner city, are in the area most affected by the acts of de jure segregation of which both the Detroit and State defendants have been found guilty.

The records disclose no adequate justification for excluding regions 1, 5 and 8 from the plan. The principal testimony pertaining to the reasons for excluding the inner city from student reassignments came from Merle Henrickson, Director of Planning and Building Studies for the

Detroit Board. Mr. Henrickson stated that the inner city "was beyond the limits of possible treatment." Exclusion of the inner city was necessary; in his view, in order to maintain "the racial mix of desegregated schools." The result of desegregating the inner city, he predicted, would be white flight.

[14] The need for stability in a desegregation plan was emphasized by the Supreme Court in *Pasadena City Board of Education v. Spangler*, — U.S. —, 44 U.S.L.W. 5114 (U.S. June 28, 1976). Apprehension of white flight, however, cannot be used to deny basic relief from de jure segregation. As said by the Supreme Court in a slightly different context:

The primary argument made by the respondents in support of Chapter 31 is that the separation of the Scotland Neck schools from those of Halifax County was necessary to avoid "white flight" by Scotland Neck residents into private schools that would follow complete dismantling of the dual school system. Supplemental affidavits were submitted to the Court of Appeals documenting the degree to which the system has undergone a loss of students since the unitary school plan took effect in the fall of 1970. But while this development may be cause for deep concern to the respondents, it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system. See *Monroe v. Board of Commissioners*, 391 U.S. 450, 459. *United States v. Scotland Neck Board of Education*, 407 U.S. 484, 490-91 (1972).

The District Court did not subject the exclusion of these three regions to the close scrutiny required by *Swann*. The District Court merely noted:

Plaintiffs refuse to acknowledge that the racial composition of these three regions precludes their inclusion in a

desegregation plan. . . . Clearly, it would be futile to attempt desegregation within the boundaries of these regions. . . . 402 F.Supp. at 1129.

This perfunctory treatment of the inner city falls far short of the "root and branch" requirements of *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), and the "all-out [15] desegregation" requirements of *Keyes v. School District*, 413 U.S. 189, 214 (1973).

In *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971), Chief Justice Burger, speaking for a unanimous court, held that the eastern part of metropolitan Mobile cannot be treated "in isolation from the rest of the school system." 402 U.S. at 38. It seems equally unacceptable to treat Regions 1, 5 and 8 in isolation from the rest of the Detroit school system.

The Detroit Board of Education contends that the exclusion of Regions 1, 5 and 8 from the plan is supported by the decision of the Supreme Court in *Pasadena City Board of Education v. Spangler*, — U.S. —, 44 U.S.L.W. 5114 (U.S. June 28, 1976). This contention is without merit. In the present case the plan adopted by the District Court, which we affirm in part, is the *first* remedy adopted in an effort to cure the effects of de jure segregation. We hold this remedy to be insufficient as to Regions 1, 5 and 8. This is not a *Spangler* situation. The Detroit Board also relies on *Washington v. Davis*, — U.S. —, 44 U.S.L.W. 4789, 4992 (U.S. June 7, 1976). We find this decision to be inapplicable here because it is the law of this case that unlawful de jure segregation, for which both the Detroit Board and State defendants are in part responsible, exists in the Detroit school system.

Even though we do not approve of that part of the District Court's plan which fails to take any action with respect to schools in Regions 1, 5 and 8, this court finds itself unable to give any direction to the District Court which would accomplish the desegregation of the Detroit school system

in light of the realities of the present racial composition of Detroit. *Compare Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1203 (1975).

Plaintiffs urge that we reverse and require the District Court to adopt the plan proposed by them. The reasons stated by the District Judge for rejecting plaintiffs' plan are set forth at 402 F.Supp. 1123-25. The District Court found that this proposal [16] would require transportation of 77,000 to 81,000 students and the purchase of approximately 840 school buses. Much of the transportation would be of black students from predominately black schools to other predominately black schools and the plan nevertheless would leave a majority of Detroit's students in schools 75 to 90 per cent black.

Our considered judgment is that plaintiffs' plan would accelerate the trend toward rendering all or nearly all of Detroit's schools so identifiably black as to represent universal school segregation within the city limits. The anticipated positive results, if any, would not justify the expense and hardship that inevitably would be involved. We agree with the District Judge that plaintiffs' plan would not satisfy the Supreme Court's mandate in this case.

A second alternative would be to reverse and order adoption of the plan originally proposed by the Detroit Board of Education. We have considered this alternative carefully and reject it because the plan originally proposed by the Board is not significantly different from the plan adopted by the court. Like the plan adopted by the court, the original Board proposal would have left Regions 1, 5 and 8 unaffected, with no changes in the allocation of students in the predominately black schools in those regions. The Board's original plan is based on the same erroneous theory as the plan adopted by the court — that the mere elimination of identifiably white schools satisfies the criteria of *Brown*.

The Board's proposal as originally suggested might have been preferable to the plan approved by the court. However, the Board now urges affirmance of the plan which it adopted

pursuant to the District Court's guidelines. As pointed out above, this plan has been well received by the citizens of Detroit.

We conclude that the differences between the two plans are so inconsequential that the compulsory adoption of the Board's original plan by order of this court would produce more confusion than any possible good that would be accomplished.

[17] A third alternative would be to reverse and direct that the District Court assign the white students now remaining in the Detroit school system among the predominately black schools on a percentage basis somewhat along the lines originally proposed by plaintiffs. It is obvious that such a requirement would accomplish nothing more than token integration, and that of uncertain duration.

Recognizing the absence of alternatives, we affirm the judgment of the District Court on the issue of assignment of students in areas other than Regions 1, 5 and 8. In affirming the District Judge's limited desegregation plan, we observe that the steps which he has taken thus far appear to us to be consistent with the fourteenth amendment, as interpreted by the Supreme Court in *Milliken v. Bradley*, 418 U.S. 717 (1974). We must, however, remand the case for further consideration in regard to the three central regions of the City of Detroit which both the school board and the District Judge excluded from their proposed remedial plans. We cannot hold that where unconstitutional segregation has been found, a plan can be permitted to stand which fails to deal with the three regions where the majority of the most identifiably black schools are located.

We recognize that it would be appropriate for us at this point to supply guidelines to the District Judge as to what he should do under this remand. Omission of such guidelines is not based on any failure to consider the problem in depth. It is based upon the conviction which this court had at the time of its en banc opinion in this case — and for the reasons

carefully spelled out therein — that genuine constitutional desegregation can not be accomplished within the school district boundaries of the Detroit School District.

The record discloses that plaintiffs are proceeding with their efforts to establish the basis for a metropolitan remedy within the Supreme Court's guidelines in *Milliken v. Bradley*. See memorandum and order of District Court dated December [18] 19, 1975, 411 F.Supp. 937. Our limited affirmance and remand in this case is without prejudice to the obligation of the District Court to proceed with that aspect of the litigation relating to the proposed metropolitan remedy.

On remand, the District Court will be empowered to make further alterations in the plan heretofore adopted by it, as the evidence may require, not inconsistent with this opinion. *Kelley v. Metropolitan City Board of Education*, 463 F.2d 732, 744-45 (6th Cir. 1972), *cert denied*, 409 U.S. 1001 (1972).

III. Educational Components

Citing the difficulties of the desegregation problems in Detroit, the District Court directed that the Detroit Board and the State put into effect certain comprehensive programs which were found to be essential to the success of the desegregation effort. The programs are referred to in the record as "Educational Components." They include (1) establishment of vocational centers, (2) a comprehensive reading program, (3) an in-service training component designed to prepare faculty and other educational personnel to deal with new experiences that arise in a school system undergoing desegregation; (4) a testing component to insure that testing procedures are fair and equitable and have no discriminatory effects; (5) a uniform code of student conduct with provisions for due process hearings; (6) a program of school community relations; (7) a program of counseling and career guidance and (8) a monitoring system to audit efforts to implement the court's desegregation efforts. Reference is made to those parts of the opinion of the District Court

published at 402 F.Supp. 1138-45 dealing with these Educational Components. This opinion of the District Court has been supplemented by additional orders. The Detroit Board of Education was required to pay the highest amount previously allocated in its budget toward such programs. The remainder of the cost would be paid one-half by the State of Michigan and one-half by the Detroit Board of Education.

[19] On May 11, 1976, the District Court entered a judgment implementing its program of Educational Components. This judgment included the following:

IT IS FURTHER ORDERED AND ADJUDGED that:

The defendant Detroit Board of Education and the state defendants shall, on or before the start of the September 1976 school term, institute comprehensive programs for:

- a) Reading and communication skills
- b) In-service training
- c) Testing
- d) Counselling and career guidance.

PROVIDED, HOWEVER, that the Detroit Board shall disclose to the state defendants its highest budget allocated in any year for each of these above-enumerated quality education programs ordered herein, and thereafter the state defendants and the Detroit Board shall compute the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs, and the state defendants and the Detroit Board shall thereafter equally bear the burdens of such excess cost imposed by the provisions

contained in this judgment and previous orders directing implementation of said educational components consistent with all orders and memoranda relating thereto;

The Michigan State defendants appeal from the judgment of May 11, 1976, as to these four of the Educational Components, contending that there is no constitutional violation which justifies these remedies and that the District Judge exceeded his lawful authority by ordering the inclusion of these four Educational Components in the remedy in this cause. The Detroit Board of Education, on the other hand, contends that all the Educational Components are within the scope of the equity powers of the court to remedy racial segregation in the Detroit schools because they help to eliminate [20] vestiges of discrimination and because they are a necessary part of the long range desegregation plan.

The District Court found that these Educational Components are necessary "to remedy effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation." 402 F.Supp. at 1118; May 11, 1976, order at page 3. This finding of fact is not clearly erroneous, but to the contrary is supported by ample evidence.

The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation.

In *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), the Supreme Court said:

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the [21] motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

Accordingly, we conclude that the findings of the District Court as to the Educational Components are supported by the record. This is not a situation where the District Court "appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution." See, *Keyes v. School District*, 521 F.2d 465, 483 (10th Cir. 1975), cert. denied, 44 U.S.L.W. 3399 (U.S. Jan. 12, 1976). We hold that the District Court acted within its equity powers in requiring the Educational Components as a part of the remedy. The decision of the District Court prescribing these components is affirmed. The matter of

allocation of the costs of these components will be dealt with in part IV of this opinion.

IV. - The Allocation of Costs as Between the State of Michigan and The Detroit Board of Education

Both the State defendants and the Detroit Board appeal from the judgment of the District Court relative to the allocation of the costs of the Educational Components. The local Board also asserts that the State should bear all the cost of 100 additional school buses.

The State defendants assert that the District Court may not, consistent with the eleventh amendment, compel the State to pay for any part of the Educational Components. Reliance is placed upon *Edelman v. Jordan*, 415 U.S. 651 (1974).

[22] *Edelman* did not involve payment of State funds "as a necessary consequence of compliance in the future with a substantive federal-question determination" or payments which became due at a time when required by a "court-imposed obligation." At issue was a retroactive award of money relief which the Supreme Court found to be "in practical effect indistinguishable in many aspects from an award of damages against the State." 415 U.S. at 668. The Supreme Court recognized that under *Ex parte Young*, 209 U.S. 123, 150 (1908), expenditure of State funds may be required by a prospective court decree without violating the eleventh amendment, even if the relief has an ancillary effect on the State treasury.

Mr. Justice Rehnquist, speaking for the majority, said:

The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized

equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible [23] and often an inevitable consequence of the principle announced in *Ex parte Young*, *supra*. (Footnote omitted.) 415 U.S. at 667-68.

The majority opinion recognized that the eleventh amendment would not apply "where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments . . ." 415 U.S. at 666, n. 11.

In *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), the Supreme Court, speaking through Chief Justice Burger, said:

The Eleventh Amendment to the Constitution of the United States provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Poindexter v. Greenhow*,

114 U.S. 270, 287 (1885); *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446 (1883). Its applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte New York*, 256 U.S. 490, 500 (1921).

However, since *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

"comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual [24] conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159-160. (Emphasis supplied.) 416 U.S. at 237.

In *Wright v. Houston Independent School District*, 393 F.Supp. 1149, 1158, (S.D. Tex. 1975), a school desegregation case, the court placed the following construction upon *Edelman*:

The Supreme Court seems to be implying here that the situation is different if the state agency violates a judicially mandated standard of action. In *Edelman* the state agency failed to live up to the standards of a federal regulation, but invalidity of its actions had not yet been determined by a court of law. In the instant case, the Houston Independent School District has been ordered by the district court to conduct itself in a specified manner. It has not done so and this may have given rise to a violation of the rights of the plaintiffs herein with accompanying monetary damages. This

difference in the circumstances may well make the case not subject to the *Edelman* decision.

For these reasons the court has determined that the eleventh amendment does not bar a money judgment for the plaintiffs.

To like effect see *Morales v. Turman*, 383 F.Supp. 53, 59-60 (E.D. Tex. 1974).

In *Cooper v. Aaron*, 358 U.S. 1, 4 (1958), the Supreme Court said:

As this case reaches us it raises questions of the highest importance to the maintainance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor [25] and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873].

* * *

The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedom guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

In *United States v. Board of School Commissioners of Indianapolis*, 503 F.2d 68, 80, 82 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975), the Seventh Circuit found an affirmative duty on Indiana state officials to assist in desegregating the Indianapolis school system. The court said: "The Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment." 503 F.2d at 82.

In *Bradley v. Milliken*, 484 F.2d at 258, this court said:

In the exercise of its equity powers, a District Court may order that public funds be expended, particularly when such an expenditure is necessary to meet the minimum requirements mandated by the Constitution. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed 256 (1964); *Eaton v. New Hanover County Board of Education*, 459 F.2d 684 (4th Cir. 1972); *Brewer v. School Board of City of Norfolk*, 456 F.2d 943, 947, 948 (4th Cir.), cert. denied, 406 U.S. 933, 92 S.Ct. 1778, 32 L.Ed.2d 136 (1972); *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969).

The opinion of the Supreme Court reversing our decision in *Bradley* did not deal with this subject.

Wyatt v. Aderholt, 503 F.2d 1305, 1314-15 (5th Cir. 1974), involved an Alabama state school designed to rehabilitate the mentally retarded which was not being operated in a constitutional [26] manner. The State defendants in that case, the Governor, the Alabama Commissioner of Mental Health and the Alabama Mental Health Board, like the State defendants in the present case, asserted that the federal court could not enter a judgment requiring the expenditure of State funds. Judge Wisdom responded to this contention as follows:

The appellants' fourth contention is that the order of the district court invades a province of decision-making exclusively reserved for the state legislature. Governor Wallace argues that the order will require heavy expenditures of state funds; that these funds will have to come from other state programs; and that the duty of compromising and allocating funds among the many programs competing for them is a duty which must be discharged by the state governor and legislature alone. Governor Wallace concedes in his brief that he is not contending that "the financial cost of complying with an established constitutional right is a valid reason for failure to comply". He "suggest[s] that before the Court

decides to adopt a new constitutional right it should consider all of the consequences of its action, financial and social, and its effect on our federal form of government". The Mental Health Board makes the point in a related way, by suggesting that the district court's order here is in effect an order requiring the state to furnish a particular service, and by citing cases establishing the general proposition that ordinarily it is not for the federal courts to say whether or in what amounts a state shall provide any particular governmental benefit or service. *E. g.*, *Fullington v. Shea*, D.Colo. 1970, 320 F.Supp. 500, aff'd, 404 U.S. 963, 92 S.Ct. 345, 30 L.Ed.2d 282.

We find these arguments unpersuasive. It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. [27] And it is the essence of our holding, here and in *Donaldson*, that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations". *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571, 580 (Blackman, J.), quoted, *Rozecki v. Gaughan*, 1 Cir. 1972, 459 F.2d 6, 8. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights". *Hamilton v. Love*, E.D.Ark. 1972, 328 F.Supp. 1182, 1194. "[T]he obligation of the Respondents [prison officials] to eliminate unconstitutionality does not depend upon what the Legislatures may do". *Holt v. Sarver*, E.D.Ark. 1970, 309 F.Supp. 362, 385, aff'd, 8 Cir. 1971, 442 F.2d 304. See also *Hawkins v. Town of*

Shaw, 5 Cir. 1971, 437 F.2d 1286, 1292. 503 F.2d at 1314-15.

The decision of the District Court in the present case imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

The eleventh amendment contention of the State defendants is without merit.

We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have [28] a causal relation to the de jure segregation that exists in Detroit. See 484 F.2d at 238-41.

The State defendants have stipulated and agreed to an equal sharing of the costs of the acquisition and construction of the area vocational centers. This court has required the State defendants to bear 75 per cent of the costs of acquiring 150 school buses. 519 F.2d 679 (1975), *cert. denied*, 423 U.S. 930 (1975). The District Court ordered that the cost of acquiring 100 additional school buses be shared on the same basis: i.e., that the buses be purchased by the Detroit Board, with the State bearing 75 per cent of the costs.

On May 11, 1976, the District Court ordered that the State and Detroit Board each pay one-half the costs of the Educational Components. Both the State defendants and Detroit Board appeal from this order. The State defendants contend that the State should not be required to pay any of the cost of these programs other than the normal share of State school aid funds provided to Detroit. The Detroit

Board contends that any requirement that it bear the major financial responsibility for the plan does not result in "balancing the individual and collective interests" as required by *Swann*, 402 U.S. at 16. The Detroit Board asserts that this court should modify the order of the District Court so as to require the State defendants to pay at least 75 per cent of the total costs of the desegregation plan and 100 per cent of the costs of 100 additional school buses.

Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no deminution in the quality of education. This principle was stated in *Hart v. Community School of Brooklyn*, 383 F.Supp. 699 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), wherein the court described the State's responsibility in a desegregation plan as follows:

[29] As part of the State's obligation to eliminate segregation, there is, of course, a concomitant obligation to ensure that there is no diminution in the quality of education . . ." 383 F.Supp. at 741.

In *Evans v. Buchanan*, 379 F.Supp. 1218 (D. Del. 1974), *aff'd* 423 U.S. 963 (1975), *reh. denied*, 423 U.S. 1080 (1976), the court said:

Accordingly, it is well established that to the extent that any schools in the State are in violation of Brown and its progeny or of this Court's orders, the State Board must bear primary responsibility." 379 F.Supp. at 1222.

The fiscal justification for the decision of the District Court in requiring that the State of Michigan pay one-half of the costs of the desegregation plan (to the extent specified in the orders and judgments) is supported abundantly by the evidence with respect to the critical financial problems now confronting the Detroit Board of Education. The Board is operating on a "survival budget". The evidence is

summarized in the brief of the Detroit Board, excerpts from which are set forth in the Appendix to this opinion.

We see no reason at this time for upsetting the judgment that the State of Michigan pay 50 percent of the costs of the desegregation plan to the extent prescribed by the District Court. We recognize, however, that it will be difficult for the Detroit Board to pay its share of the costs. (See Appendix.) Our affirmance of the District Court on this issue is not intended as a mandate for a cutback in essential educational programs in order to meet the expenses of implementing the desegregation plan. We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportionate payment by the State of Michigan if found to be required by future developments.

Our previous order requiring the State to bear 75 per cent [30] of the cost of 150 school buses is reaffirmed. The order of the District Court requiring the State to bear 75 per cent of the cost of the 100 additional school buses is affirmed.

V. Faculty Desegregation

Originally Judge DeMascio declined to order any reassignment of faculty in response to a proposal by the Detroit School Board that each Detroit school should have a teaching staff half white and half black. On August 28, 1975, however, the District Court entered the following order:

Pursuant to this court's Memorandum Opinion and order dated August 15, 1975, this court's Supplemental Memorandum and Order dated August 18, 1975, and this court's Order dated August 26, 1975;

IT IS HEREBY ORDERED that incidental to and concurrently with the implementation of the plan of student desegregation as hereafter ordered by the court, teachers in the Detroit School System shall be reassigned insofar as necessary, and subject to collective

bargaining agreement provisions otherwise applicable and not inconsistent with this order, to achieve a distribution of not more than 70% of teachers of one race in each school.

The Detroit Federation of Teachers, Intervenors, and the Detroit Board appeal from this order, taking diametrically opposite positions. The teachers contend that it is the law of the case, under findings of fact by both Judge Roth and Judge DeMascio, that there has been no racially discriminatory assignment of Detroit faculty and that there is no lawful predicate for any faculty reassignment order based on race. The Board contends that the court erred in rejecting a 50-50 ratio proposed in the original Board plan. It is asserted that adherence to the District Court's 70 per cent figure has caused the Board to be out of compliance with 45 C.F.R. 185.44 (d) (3), thus preventing the Detroit school system from receiving [31] funds under the Emergency School Aid Act, 20 U.S.C. § 1602 (Supp. II, 1972).⁵

Additionally, the Detroit Board contends that the District Court erroneously ruled as inadmissible: (1) testimony that the balance of staff provisions of the collective bargaining agreement have not brought about the anticipated racial ratios of teachers in individual schools; (2) testimony that teacher transfers were necessary when students were reassigned, grade structures changed and schools closed; and (3) testimony that the racial ratio of teachers must be changed in order to qualify for federal funds.

The State defendants support the position of the teachers. The plaintiffs support the position of the Board.

We reject the contention of the intervenors that the order of Judge Roth, entered in 1971, deprives the Board of Education or the court of power to reassign teachers in 1976. *c.f.*, *Swann*, 402 U.S. 1, 16 (1971); *Keyes v. School District*, 521 F.2d 465, 484 (10th Cir. 1975), *cert. denied*, 423 U.S.

5.

The Emergency School Act makes no distinction between de jure and de facto segregation. 20 U.S.C. § 1602(b).

1066 (1976); *see also*, *Morgan v. Kerrigan*, 509 F.2d 580, 595 (1st Cir. 1974), *aff'd*, 379 F.Supp. 410 (D. Mass. 1974), *cert. denied*, 421 U.S. 963 (1975).

It is significant that Judge Roth's order of June 14, 1972 (dealing with a contemplated metropolitan remedy), 345 F.Supp. 914, 931, 938, made provisions for reassignment of faculty.

The reassignment of faculty is similar to the reading and counseling "Educational Components" which we have upheld in Part III of this opinion. It helps to mitigate the fact that the majority of Detroit's children are left in schools that are overwhelmingly one race. Reassignment of faculty serves to provide these children with the maximum desegregative experience possible under the circumstances.

[32] In fashioning a desegregation remedy which involves reassignment of faculty it is obvious that, if otherwise feasible, a District Court should leave a school system in compliance with applicable federal regulations. We express no views in this opinion as to whether the above quoted August 28 order of the District Court disqualifies the Detroit school system from receiving aid.⁶ This question is not before us.

Although the District Court has the authority as an equitable remedy to order the reassignment of faculty, we conclude that further consideration should be given to this issue. Accordingly, we vacate the above-quoted order of the District Court, dated August 28, 1975, and remand this aspect of the case to the District Court for the hearing of the evidence on the issue of faculty assignment.

VI. Conclusion

The case is remanded to the District Court for further proceedings not inconsistent with this opinion. No costs are taxed. Each party will bear his own costs on this appeal.

⁶ See 42 U.S.C. § 2000d-5 (1970).

[33]

APPENDIX

Financially, the Detroit school system has been devastated by a series of compounding economic crises. The period between 1970 and 1976 has marked an all-time low in the system's ability to absorb and compensate for the costs of educating Detroit's children.

The cost of education is a function of the size of a school district. (TR. Vol. 7 at 110-111). The Detroit system is the largest school district in the State and encompasses the largest number of indigent students in Michigan. (TR. Vol. 25 at 88). The cost of providing educational services in Detroit has gone up disproportionately to the continuing above-state average drop in school enrollment. (TR. Vol. 24 at 131). This cost increase reflects the additional cost of doing business, without improving educational services. (TR. Vol. 24 at 125-126; Vol. 7 at 85-86).

Actually, since 1971, the Detroit school system has experienced severe financial crisis as a result of the loss of property tax revenues by virtue of urban renewal and highway construction; the exodus of business and industries to the suburbs and the concomitant outward population flow from the city. (TR. Vol. 7 at 92). At the same time, the system was experiencing escalating educational costs forcing the Board into a "survival" budget under which the system was forced to provide only minimal educational services while eliminating many crucial educational programs.

By 1973, the system had accumulated a 68 million dollar deficit and was within four days of closing its doors due to the lack of funds. (TR. Vol. 7 at 82). As a result of special state legislation, the Detroit system was able to finance its debt over a period of years and continue operations utilizing a portion of the operating budget for repayment. However, by law the Detroit Board was required to operate within a balanced [34] budget which has necessitated a continuation of the "survival" budget instituted in 1971.

The Detroit school system is financed by property taxes as allocated by the Wayne County Tax Allocation Board and as voted by the electors of the school district, by declining State Aid supplied by the state legislature based upon the number of students in the school district and the State Equalized Value (SEV) of property in the district and by special funds from the Michigan legislature and from federal sources. (TR. Vol. 7 at 87-90, 93, 95, 105; Vol. 25 at 106-107; Detroit Board Ex. 42 and 43). State Aid comprised approximately 47% of the total 1974-75 budget and federal funding provided approximately 15% of that budget. The Detroit Board does not have the power nor the authority to levy an income tax to finance school operations, nor can the Board levy additional millage without a favorable vote of the electorate. (TR. Vol. 7 at 86; Vol. 24 at 151; 157; Vol. 26 at 20).

Detroit's municipal tax overburden is a function of its size and the result of the many municipal services provided by Detroit which are not provided or required by other municipalities but which are utilized by citizens of the entire southeastern Michigan area.

Over the past five years, Detroit's SEV has remained relatively static compared to the increasing SEV of the rest of the State. The School Aid Act provides a power equalizing formula to supply a more uniform flow of State revenue to school districts to remedy the widely variant per pupil SEV. The per capita SEV in Detroit is 50% lower than the average for the 20 largest cities in Michigan, thus requiring more millage to be levied by Detroit taxpayers to obtain an equal yield. (TR. Vol. 7 at 105; Detroit Board Ex. 31).

The municipal overburden inequities have been recognized by the State and school aid is supplied school districts whose municipal overburden is in excess of 125% of the state average. [Bursley Act, MCLA 388.1225; MSA 15.1919 (525)]. While [35] the power equalizing membership section of the Act, in which all qualifying school districts can share, is fully funded, the municipal overburden section of the Act

is presently funded by only approximately 28% of the total amount authorized. Detroit, with the greatest overburden in the State, presently received 91% of the allocated funds in the overburden section of the Act pursuant to the formula.

If the overburden section were fully funded, the Detroit system would receive an additional 61.6 million dollars. If it were funded by 50% (as was done in 1972-73), the system would receive an additional 18.7 million dollars more than is presently received. It is clear that the State does not provide the Detroit Board with all the money in State aid which it should or could.

On July 1, 1975, the Central Board of Education adopted a 1975-76 general fund-general purpose budget in the amount of \$310,231,253. The budget as adopted was a balanced budget based upon projected revenue and anticipated expenditures. However, total anticipated revenues from state, local and federal sources were short of meeting expenditure requirements by \$4,691,496. In order to balance the budget at \$310,231,253 an allocation of \$4,691,496 was required from prior year general fund equity to close the gap between revenues and expenditures.

The 1975-76 budget is essentially a continuation of the inadequate level of educational services of the past several years. In January, the Detroit Board cut close to \$17 million from its budget for the second half of the school year. Annualized, this cut amounted to about \$34 million. At the time, this was close to 15% of the Board's general purpose budget. In addition, emergency cuts of \$10.7 million were instituted during the 1973-74 school year. Annualized savings from these said year cuts are about \$20 million. Detroit has not been able to restore the programs and services eliminated or curtailed as a result of these further budget costs.

[36] Expenditures have been reduced and postponed each year since 1971. The cumulative effects of past cutbacks have already begun to have serious consequences for educational programs. Continuing these cuts merely compounds the damage. Each year it becomes more costly to restore these

services because of the inflationary spiral. For those students who have left the system, it is already too late to have any effect regardless of cost.

Subsequent to adoption of the 1975-76 budget, state aid revenue which had been originally estimated at \$159,318,160 were reduced to \$152,467,601 as a result of decreases in the municipal overburden allocation to Detroit, a .6% statutory reduction, a 1.7% executive order reduction, and various other state aid adjustments. In order to maintain school programs and services, the \$6,850,559 reduction in state aid was replaced from prior year general fund equity.

In addition, a number of supplemental budget allocations were required in 1975-76 to meet mandatory operating costs in such areas as transportation, bilingual/bicultural programs and building operation and maintenance. Based upon the total supplemental appropriations and replacement of state aid revenue losses, the Detroit school district faces a potential budgetary deficit of approximately \$5,700,000 in 1975-76. The general fund equity accumulated from prior years will be completely exhausted.

Estimated general fund-general purpose expenditure requirements for 1976-77 are approximately \$336 million.¹ This estimated level of expenditure reflects only the increased cost of doing business in 1976-77 at the same level of services as 1975-76. The increases in cost are of a nondiscretionary nature and include negotiated salary adjustments and increments of \$20,000,000, inflationary increases of \$4,500,000, and a contingency for unanticipated charges equal to 1% of the total [37] budget or \$3,360,000. Except for those desegregation components implemented this year, i.e., pupil transportation and bilingual/bicultural, no provision has been made for desegregation costs.

With regard to projected reserve, there is a potential gap of over \$37 million between estimated 1976-77 expenditure

1. This compares with 310.2 million dollars in 1975-1976. There will be no general fund equity to supplement any increases.

requirements and current year reserve estimates. This gap will have to be closed by reducing the projected level of expenditure through an additional cutback in educational programs and services and/or increasing revenues. If additional revenues are not obtained from local or state sources, existing programs and services would have to be cut by up to \$37 million to balance the 1976-77 budget. If a deficit is incurred in 1975-76, that amount would also have to be included as part of the budget cuts required in 1976-77.

At least three state aid bills are currently before the legislature. It is unlikely that the state will fund any appreciable increase in state aid for 1976-77. Consequently, at best, state revenues for next year will be at the same level as in 1975-76.

The record reflects, and the District Court so found, that there is no possibility of the citizens of Detroit voting additional millage for operation of the school system in the near future. Detroit taxpayers shoulder the highest tax burden in the State. (TR. Vol. 24 at 146-147; Detroit Board Ex. 30, 41). Additionally, Detroit taxpayers have the highest municipal tax overburden in Michigan. (TR. Vol. 7 at 104, 109-114; Vol. 24 at 147; Detroit Board Ex. 33). Detroiters pay a 28.58% higher property tax rate than the State average. (TR. Vol. 24 at 146; Detroit Board Ex. 41). Of the past eight millage elections for additional revenue, seven have failed and a reasonable expectation is that no additional millage will be voted in the near future. (TR. Vol. 24 at 143-144, 147, 150-151; Vol. 7 at 140, 144; Detroit Board Ex. 40).

Notwithstanding this dismal prediction by the District Court, the Detroit Board plans to place a millage proposal before [38] the electorate of the City of Detroit for a 3 mill tax to maintain existing programs and a 2 mill tax for modest improvements (App. at 35a) in a desperate attempt to increase revenues for the 1976-77 school year. This millage proposal was preceded by a recent vote of the electorate which increased taxes to finance a court ordered construction of a new jail facility. Again, the immediate tax burden of

Detroit residents has been increased, and the Detroit Board's request must follow closely on the heels of this recent tax burden increase. Additionally, the legislature and the City Council have just voted a 3 mill garbage tax. Similarly, City of Detroit property owners will pay a 2-2.5 mill tax increase for City debt retirement (App. at 35a).

In light of all the above, the financial impact of implementing the District Court's adopted desegregation plan is readily apparent upon a cursory review of the relevant orders of the District Court between August 15, 1975 and May 11, 1976.

On August 15, 1975, the District Court (App. at 1a-15a) ordered, exclusive of transportation costs, the establishment of four vocational centers; formulation of two additional technical high schools patterned after Cass Tech; institution of comprehensive programs for a) in-service training, b) bi-lingual/multi-ethnic studies, c) counseling and career guidance, d) testing, and e) co-curricular activities; equalization of all school facilities and buildings; and comprehensive construction and restoration programs.

On October 29, 1975 (App. at 16a-19a), the District Court ordered the Detroit Board to devise an in-service training program for all school personnel to provide instruction in the "fair, non-discriminatory" administration of the Student Code of Conduct; and an in-service training program for the reading program.

Later, on November 10, 1975 (App. at 20a-22a), the District Court ordered the Detroit Board and the State Defendants to jointly identify and acquire suitable sites for five vocational [39] centers and take steps to construct such sites as soon as possible; and the in-service training of reading instructors.

On December 4, 1975 (App. at 25a-26a), the District Court ordered implementation of the Detroit Board's October 8, 1975 proposal for a reading instruction program, including in-service training of all instructors.

On January 14, 1976 (App. at 27a-29a), the District Court ordered the institution of the Detroit Board's Modernization Program.

Finally, on May 11, 1976 (App. at 30a-34a), the District Court ordered equalization of all school facilities and buildings preparatory to the 1976-77 school term; continuance of the comprehensive construction and renovation program; the institution of a reading and communication skills program together with the necessary in-service training therefor the institution of the testing program with the accompanying in-service training; institution of the counseling and career guidance program with the accompanying in-service training; the application of a formula for equal sharing of excess cost of implementing the educational components by the Detroit Board and the State Defendants; institution of the vocational education program; institution of a comprehensive program for bi-lingual/multi-ethnic studies; and institution of the in-service training program for implementation of the Uniform Code of Conduct.

Even without actual dollar figures, the financial impact of these orders could easily destroy the educational program of the Detroit school system. The financing of these components by the Detroit school system would only mean a concomitant elimination of existing programs.

It is virtually impossible for the Detroit Board of Education to re-order its priorities when it is already operating on a woefully inadequate budget that cannot provide a minimal quality educational program. Any attempt to redistribute available [40] resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul.

Nevertheless, the school district is required by law to adopt a balanced budget by July 1. In order to do so, expenditure requirements will have to be reduced to the level of expected revenue. This will mean a drastic cut in existing programs and services. The school district will not even be

able to maintain current levels of educational programming; therefore, it would certainly be a futile gesture to consider funding the increased costs of implementing desegregation components.

The May 11, 1976 Judgment appealed presents a highly structured and effective desegregation plan. However, the Judgment fails to establish a satisfactory financing scheme to properly and equitably dispense the costs of underwriting such a plan.

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
 Cincinnati, Ohio 45202

John P. Hehman
 Clerk

August 4, 1976

Re: Ronald Bradley, et al., vs. William G. Milliken,
 Governor of the State of Michigan, et al.
 Our Nos. 75-2018, 75-2295-6, 75-2443, 76-1635, 76-1678
 Dist. Ct. Civil No. 35257

Gentlemen:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on this appeal.

Very truly yours,
 John P. Hehman, Clerk

By
BETTY TIBBLES /s/
 Betty Tibbles
 Deputy Clerk

Enclosure

Supreme Court, U. S.
FILED
DEC 30 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al,

Petitioners,

v

RONALD G. BRADLEY, et al,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED

SEPTEMBER 28, 1976

CERTIORARI GRANTED NOVEMBER 15, 1976

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al,	Civil Action
Plaintiffs,	
v	No. 35257
WILLIAM G. MILLIKEN, et al,	
Defendants.	

RELEVANT DOCKET ENTRIES

1974

Dec 26 519 Mandate from C.C.A. remanding case back to U.S. District Court for Eastern District of Michigan for further proceedings in conformity with the opinion of Supreme Court

1975

Jan 7 520 Order re that case is assigned to Judge DeMascio, filed and entered. 1/6/75

13 522 Order for status report, filed and entered

31 524 Order re pre-trial set for Feb. 18/75 at 2:00 P.M., etc., filed and entered

Feb 12 530 Answers of the plaintiffs and the Detroit Board of Education, the defendants Milliken, et al, and the Detroit Federation of Teachers and Citizens Committee for Better Education to Request of Court for a Joint Status Report; attachments; and certificate of service

19 542 Answers of the plaintiffs and the Detroit Board of Education, the defendants Milliken, et al,

and the Detroit Federation of Teachers and Citizens Committee for Better Education to Request of Court for a Joint Status Report— supplemental answer of Detroit Board to Question No. 9 of Joint Status Report with certificate of service

- Mar 5 550 Plaintiffs motion for leave to file second amended complaint with proposed amended complaint and brief
- 12 553 Order re pre-trial set for April 21/75 at 2:00 P.M., etc., filed and entered
- Apr 1 573 Plaintiffs' desegregation plan for the assignment of pupils 1975-1976 Detroit Public Schools
- 1 574 Plan for desegregation of the Detroit School District within City Limits of Detroit submitted by defendants Board of Education of the School District of the City of Detroit, et al
- 15 587 Order re appointment of experts for and on behalf of the court; that evidentiary hearings on the Detroit Board of Education desegregation plan shall commence at 9:00 A.M. on Tuesday, April 29/75, etc., filed and entered
- 21 591 A critique of the desegregation plan filed by the Detroit Board of Education submitted by the Michigan State Board of Education and the Superintendent of Public Instruction with letter and certificate of service
- 21 592 Objections of defendants Governor, Attorney General and State Treasurer to the desegregation plan filed by defendant Detroit Board of Education with certificate of service
- 29 594 Plaintiffs' second amended complaint with certificate of service and letter attached

- 29 — Hearings begin. Adjourn to April 30/75 at 9:00 A.M.
- May 2 601 Plaintiffs' motion to require purchase of transportation equipment; certificates (2) of service; and notice of hearing
- 8 607 Response of Detroit Board of Education to plaintiffs' motion to require purchase of transportation equipment
- 9 609 Response of defendants Milliken, et al, in opposition to plaintiffs' motion to require purchase of transportation equipment
- 21 612 Memorandum opinion re acquisition of transportation, etc., filed and entered
- 21 613 Order for acquisition of transportation, filed and entered
- 23 615 Notice of appeal by defendants from the order for acquisition of transportation equipment
- June 12 621 True copy of order from C.C.A. affirming order of the District Court requiring the acquisition of school buses, etc., with letter attached
- 23 630 True copy of order from C.C.A. re order for acquisition of transportation with attachments
- 27 638 Order re acquisition of vehicles and the necessary drivers, etc., filed and entered
- 27 — Court hearings continued. Closing arguments concluded.
- Aug 15 652 Memorandum opinion and remedial decree, filed and entered
- 15 653 Partial judgment and order, filed and entered

Aug 18 654 Supplemental memorandum and order, filed and entered

25 658 Notice of Appeal by plaintiffs

28 665 Order [Teacher Reassignment], filed and entered

Sep 17 694 Notice of Appeal by the Detroit Federation of Teachers. Rec. #07733-\$5.00 Rec. #07731-Bond-\$250.00

26 707 Notice of Appeal by defendant Detroit Board of Education from the order entered Aug. 28/75

Oct 8 719 Memorandum and order [Acquisition of additional 100 buses], filed and entered

28 739 Notice of Appeal by the Board of Education of the City of Detroit, et al

Nov 4 745 Memorandum and order, filed and entered

14 750 Copy of true copy of denial of petition for a writ of certiorari by the U.S. Supreme Court

20 753 Judgment, filed and entered

1976

Mar 12 — Court held an in-chambers conference (4 hours)

23 811 Stipulation by defendant Detroit Board of Education and defendant State Board of Education with respect to the establishment of vocational education centers with exhibits

Apr 29 814 Memorandum and order setting petition seeking a temporary restraining order and preliminary injunction of the Detroit for hearing on May 7/76

29 815 Order adding Michigan Department of Corrections, and its director Perry Johnson, and the

Michigan Commission of Corrections and its members Florence Crane, G. Robert Cotton, B. J. George, Thomas K. Eardley, Jr. and Duane L. Walters and The Salvation Army of Michigan as parties defendant for the limited purpose of providing court with an opportunity to fashion a complete and effective remedy

29 819 Petition of the Detroit Board of Education for temporary restraining order and preliminary injunction and to add parties defendant with affidavits (parties already added—see 815)

May 7 — Hearing on petition for turnover order and preliminary injunction re the acquisition of the Evangeline Home—hearing continued to May 18/76 at 9:30

11 825 Memorandum, order and judgment with appendix, filed and entered

11 826 Judgment re to continue monitoring services, etc., filed and entered

May 17 831 Notice of Appeal by D-O of memo and order and final judgment entered on May 11/76

21 — Hearing continued, concluded

26 835 Notice of Appeal by defendants Board of Education of the City of Detroit, etc., of Order and Judgment and Judgments entered by the District Court on May 11/76 with certificate of service

June 25 897 Memorandum and order re that defendant Detroit Board of Education present an injunctive order, etc., filed and entered

July 1 903 Motion of defendants Milliken, et al, to stay May 11/76 Judgment pending decision on ap-

peal; exhibits; certificate of service; and notice of hearing before Judge DeMascio on July 19/76 at 9:00

- 8 904 Permanent injunction re that "the state and added defendants, their agents, attorneys, successors, employees and assigns, hereby are forever enjoined from purchasing, leasing, renting or otherwise using the Evangeline Home as a correctional institution", filed and entered
- 14 907 Notice of Appeal by defendants William G. Milliken, Governor of the State of Michigan, et al, from the Permanent Injunction entered on July 8/76
- 15 911 Affidavit in support of stay motion—affidavit of Robert N. McKerr, Associate Superintendent for Business and Finance within the Michigan Department of Education—with certificate of service
- 19 — Motion/stay order of May 11/76 taken under advisement
- Aug 3 916 Memorandum and order denying defendants' motion for a stay, etc., filed and entered
- 6 921 Notice of Appeal filed by The Salvation Army
- Sep 8 933 Mandate from C.C.A. remanding case to District Court for further proceedings
- Oct 6 936 Motion of the Detroit Board of Education to compel state defendants to comply with this Court's order of May 11/76; affidavit; and certificate of service

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al., <div style="text-align: right;">Plaintiffs,</div> <div style="text-align: center; margin: 10px 0;">v</div> WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al., <div style="text-align: right;">Defendants.</div>	No. 35257
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**EXCERPTS FROM TRANSCRIPT OF
PROCEEDINGS—REMEDY HEARINGS**

**TUESDAY, APRIL 29, 1975
(Vol. I)**

DR. CHARLES WOLFE, having been duly sworn

• • •

(Direct Examination by Mr. Roumell)

[Vol. I 72] Q. Dr. Wolfe, do you have an opinion as to the need of these educational components in the plan? A. I feel that the educational components are certainly a major part and a very necessary part of the plan.

Q. And why is that? A. The further desegregation of the system as it is outlined in this plan will uproot from their current school locations, a great many students. I think we're all aware that there is a great community interest in anything that happens here in terms of our school system. This is the system that I think, to some degree, comes under some un-

deserved criticism as to the quality of its educational offering, although I can understand the problems in correct appraisal of that. The system has certainly undergone several years of almost constant crisis. If we were now to add one more component to the burdens of the system, I think the affect could be unfortunate for the immediate delivery of educational services, and I would feel that very obvious moves to improve the quality of the education we offer those children would be exceedingly helpful in making the desegregation plan work. I should also point out that most regretfully, I have had to hold the financial line on assisting our teachers and our administrators in the school, in the classroom [73] throughout my tenure. We have had to move to a balanced budget. We have not been able to implement many of the needs of the system. We have cut back consistently for five years. In fact, as I pointed out, the last two years we have not only affected cuts, many of the areas where we have not spent money have simply been postponements of funds that will have to be spent eventually anyhow. In short, what I'm saying is that I think in order to make a massive change in the system such as proposed by any of the desegregation plans, we need at the same time, to most obviously and openly move to improve the quality of education.

Q. Let me ask you this question. Are you telling this Court that unless the quality of education is improved that the desegregation plan cannot work? A. It will certainly be enormously more difficult to make it work.

Q. Doctor, you mentioned some burdens that the system has had in recent years. Are you referring to financial burdens? A. That is the primary one.

Q. By the way of background, could you explain that to the Court and to the Commissioners? A. Yes. When—and I'll make it very brief. When I came on [74] this job four years

ago, the system was operating under a burgeoning deficit. By the time we got a handle on it with the help of citizens of this community and the legislature, it had grown to approximately 75 million dollars.

Q. Out of a budget of how much? A. At that time, about 250 million. We simply couldn't handle that. We came, actually in '73, within four days of being unable to meet a payroll when we got assistance from the legislature in the form of allowing the Board of Education to tax the people of the City of Detroit, without a vote of the people to do two things. One, to retire the deficit, or at least to finance the deficit, and the other to have a substitute income for a failed millage to continue the operating of the school system. Actually the system today is collecting two more mills in taxes than we collected in 1966, which is about 13 million dollars. Were it not for increases in the proportion of State aid over these recent years, we wouldn't be open today.

. . .

[75] Q. Does the system have the resources at the present time to pay for that cost? A. No, we don't.

. . .

(Cross Examination by Mr. McCargar)

[121] Q. Thank you. Now, at the present time, at what rate of taxation is the Detroit Board of Education levying for school operating purposes? [122] A. At about 24.76 mills.

. . .

THE WITNESS: We're levying 24.76. We get credit for the mills that levied for the return of [123] the deficit in terms of the credit for State aid.

THE COURT: Yes. You said the State average was 26.15.

THE WITNESS: Yes.

. . .

[125] Q. Understandably so, yes. Now, can you tell me why the Detroit Board of Education is not levying at, offhand, the same rate as the State average for school districts if it is in need of financial assistance? A. We would very much like to and we have tried without success. I think I must point out that the city, itself, has a very high tax rate, about 84 mills, far in excess, I believe, of any other community. The taxpayer has difficulty subtracting, or differentiating between that which is the cost to him for education and that which is the cost to him for his total tax bill, having the opportunity to vote on the tax for education. We have tried six times in my tenure for a millage vote. We lost four of them. We won two, but I'm sure the reason we won those two, which by the way were for replacements of expired millages, was because in the one case, we said we would eliminate the income tax, which had been given us. And in the second case we indicated from the legislature that if that were successful, we would lose the power to levy an income tax.

. . .

(Redirect Examination by Mr. Roumell)

[134] Q. Dr. Wolfe, were there any factors that caused the income of the Detroit Board to go down during the period from 1965 to 1974? [135] A. Yes. Well, a good deal of it happened just prior to that. During the decade of the 60's, the reduction in the assessments on property in the City of Detroit were reduced to the 50 percent level. This was over a period of a decade. And the tax that had been suggested for the City of Detroit by the earlier so-called Romney study which was

adopted by the Board, the tax laid and passed in that early millage simply then, under the reduced assessment, did not reduce the money that was necessary. The loss during the 60's was approximately 92 million dollars.

Q. 92, and you were in deficit 75? A. Yes, sir.

Q. And is it a fact that this loss was caused by the tearing down of buildings in Detroit? A. That was part of it. The expressway construction, but reduced assessments too.

Q. Were there any other factors? A. Well, we had, a decade of inflation that increased toward the close of the time before we got a handle on the deficit.

Q. And is it true that several years ago, the Michigan Supreme Court ordered you to buy books and material for all children? A. Yes, sir. There were a number of such things. The sudden order that we had to provide textbooks free to all students [136] started at about a cost of about 4 million dollars to us. Up to that time, most high school students had been purchasing their own books. Since that order, we have provided all of them. The increase in the cost of textbooks over the last half dozen years has been phenomenal.

Q. And we're talking about 261 thousand children? A. This year and for the four years prior to that we had about 295 thousand children five years ago.

Q. Then, Dr. Wolfe, unlike the statement of counsel, the Attorney General, the reason why you got this deficit was because of the drop in assessed evaluations and outside factors such as the Supreme Court decision that caused a drain on the fund raising abilities of the system, is that correct? A. That is correct.

Q. And Dr. Wolfe, would you say it's common knowledge that particularly in the last year we have had an extremely high rate of unemployment in the City of Detroit? A. Yes, we have.

Q. Would this have a bearing on the ability to vote millage, in your opinion? A. It certainly would because the income of average citizens in the City of Detroit convinces them, I believe, that they can't afford more expenditures. And this is one they [137] get a chance to vote on.

. . .

(Recross Examination by Mr. Atkins)

[142] THE WITNESS: In the development of the plan, we were very concerned about the educational components of the plan. We put together the plan with those educational components in. So, I'd have to answer it at this time, I haven't tried to set a priority on those components. Very seriously, I'd have to give—if that is what your question is to me, which would you prioritize, I would have to give that some very careful thought and as to which ones I felt we could drop from the plan, I'm not prepared at this moment to say that we would put any in there that we didn't attach great importance to in terms of making this a workable, viable plan.

. . .

CORNELIUS L. GOLIGHTLY, having been duly sworn

(Direct Examination by Mr. Roumell)

[Vol. I 177] Q. Well, Dr. Golightly, if these educational components were not included in the plan, you feel that a desegregation plan would come of Detroit? A. The point is if they are not included in the plan, you'd have simply an

empty form of obeying a Court Order to move the black and white children around without bringing anybody into anything. You see the whole question is what do you do with a black school system when you say, we'll move them around. I'm not anti-busing. I believe in integration. I believe in desegregation, I believe very strongly that you must desegregate. But simply to say that any school system that is now somewhere in the neighborhood of 71-29 to simply move them, nothing would be gained. There are not enough to go around. I think if you had enough to go around, then you might move them. But to me, just the sheer movement creates a turmoil without any concerting factor. . . .

. . .

[184] Q. Doctor, would it be fair to say that based upon your experience as the only black member of the Milwaukee School Boards, as a minority member of the Detroit Board, and now a member of the majority and as President of that Board, as an educator in your own right, one who has been engaged in inspecting colleges, as one who has been deeply committed to the Civil Rights movement in this country, do you believe that this is a plan that is practical and can work now and hereinafter, and is viable. A. I do.

WEDNESDAY, APRIL 30, 1975

(Vol. II)

DR. CORNELIUS L. GOLIGHTLY (continuing)

. . .

(Cross Examination by Mr. McCargar)

[Vol. II 40] Q. Dr. Golightly, you testified on direct-exam-

ination that the State has not given us our fair share in terms of money? A. Yes.

• • •

THE WITNESS: Yes, speaking not as a financial expert, but simply as the president of the Board of Education that goes to the State and we realize we receive our aid from the State, there is a formula which I am sure is well known to you and others, by which money is allocated to the children in each school district. And the constitution of the State of Michigan says it is the State's responsibility for the education of the children. Now we in Detroit are paying somewhere in the neighborhood [41] of about 80 mills, and that 80 mills, or something like 24.76 goes for the education of our children. Now, some of that money is equated with other moneys that come to it, but the point that is very clear is that we have neighboring areas in which their total taxes might run to only 60 mills and they might give 35 of those mills to education. We in Detroit subsidize heavily the suburban area in terms of transportation, in terms of water, in terms of police protection, in terms of health facilities, in terms of the fact that Wayne State University sits in the middle of the City and everybody from miles around comes to it. This is what I mean when I say the State has never, in terms of let's say, fully funded the municipal overburden. We have not had our fair share of funds. I don't know what the real figures are and how you work it out. • • •

• • •

WEDNESDAY, MAY 7, 1975

(Vol. VII)

ALFRED M. PELHAM, having been duly sworn

• • •

(Direct Examination by Mr. Roumell)

[Vol. VII 82] Q. Mr. Pelham, is there an organization known as the Task Force for Education in the City of Detroit?

A. There is, it is called the Detroit Education Task Force. It has been in existence since January, 1973.

Q. Could you tell us what your connection is, if any, with that task force? A. I am serving as one of three co-chairmen with Stanley Winkleman and Dr. Ethelene Crockette. The Task force is made up of about 60-odd members in addition to the co-chairmen.

Q. Can you tell us what the function of the task force is? A. It came into being actually by appointment of the Detroit Board of Education in the latter part of 1972 at a time when the Detroit School system was facing a very serious financial crisis with a threat that schools might be closed by March 31, the following year, that is March 31, 1973. The Board was confronted by what was in their context a staggering deficit which earlier was estimated at about \$75,000,000. Actually it turned out to be in the area of \$68,000,000.

[83] Q. In the area of finances did the task force consult with the Detroit Board of Education on finances? A. The first task we confronted, as I have indicated, was to help in resolving this eminent crisis and steps were taken immediately to confront their problem as a result of which with the assistance from others we were able to secure from the State Legislature the passage of Public Acts One and Two of 1973 which provided the bases for the resolution of this crisis by authorizing the Board to levy a two and a quarter mill tax to fund this deficit, to levy up to one mill income tax to provide funds for the following fiscal year to fend against the recurrence of the crisis. We provided for the advancing of certain monies immediately to provide the cash necessary to keep the school

system open and it set up certain conditions which had [84] to be followed subsequently by the Board in assuring the balance of their future budgets.

Q. As a result of Public Acts One and Two of 1973?
A. Right.

Q. Does the Detroit Board presently levy 2.25 mills for the purpose of retiring the debt? A. Yes, this was ordered and the Board acted immediately upon the organization to levy this tax. Bonds were issued to repay some of the advances and bonds were issued with the security of the 2.25 mills which are currently being levied and the debt will be paid we expect in about seven years.

. . .

[85] Q. You just testified that the Detroit Board is projecting it will need \$28,000,000 more next year than it is receiving this year? A. That is correct.

Q. Is that for operating expenses? A. That is exclusively for operating expenses. I might add that gratuitously it provides for a level of operation substantially the same as that of the current fiscal year level.

Q. Based upon your knowledge of the Detroit School system, based on the present State aid, could you tell us whether or not in your opinion the system can absorb any more costs?
A. It cannot absorb any additional costs. As a matter of fact [86] without this \$28,000,000 which they are requesting they will not even be able to continue the present level of operation.

Q. You are talking about operations as they are going on in 1974-75 school year? A. That is correct.

. . .

Q. There is a suggestion in that report that the Detroit School District could levy additional millage. Do you have an opinion as to the ability of the Detroit School system to levy additional millage at the present time? A. The Detroit School District does not have the power to levy additional millage without a favorable vote on additional millage by the electorate of the City of Detroit. It cannot unilaterally levy such millage. As a matter of fact, last fall the Detroit Board did seek to increase the millage by a vote of the people and that was turned down by the electorate. My judgment is that at the present time having been turned down when economic conditions were substantially [87] better in the City of Detroit than they are now that for that and other reasons it would be totally unlikely that a favorable vote on additional millage could be secured. Added to that is the fact the City of Detroit is currently levying the highest tax burden against its citizens of any city in the State by a considerable amount, as a matter of fact, at a ratio of about three to one in relation to the 20 other largest cities in the State of Michigan.

. . .

[88] Q. You have indicated that your committee has made some recommendations concerning the membership formula?
A. We have.

Q. Mr. Pelham, is this membership formula as a result of the so-called Bursley Bill? A. It's frequently referred to as the Bursley Bill. It is the current legislative act which provides for provision of State aid for the elementary-secondary education in the State of Michigan.

Q. It was passed about two years ago, the basic formula?
A. That is correct.

Q. Does that Bursley Bill provide a section that is sometimes known as power equalizing? A. The methodology

used in the distribution of school aid under the general membership formula is generally known as the power equalizing plan.

Q. Could you explain what the plan is and how it works now? Explain what is the power equalizing methodology and how it works now in Michigan. A. The power equalizing plan is designed to provide a more uniform flow of state revenues to the various school districts in the State of Michigan in respect to which the state equalized value per capita or per pupil are widely variant with the result that districts get a lower tax yield if they have a [89] lower state equalized value base and to fend against this inequity power equalizing establishes a so-called SEV guarantee or State Equal Value guarantee at a certain level per pupil. In the current year that guarantee is \$39,000 and in the current bill it is applied against a maximum of 25 mills.

Q. What does that mean? A. That means in brief that the total amount of State aid per student is determined by multiplying 39 by 25, 39 being the amount per thousand that applies to this millage. It is actually 39,000 multiplied by .025, but for the sake of simplicity this equates to 39 per thousand, so you can multiply 39 by 25 and the maximum guaranteed yield for the current year is 975.

Q. So if a school district levies 25 mills in the State of Michigan they will be guaranteed 39 per thousand? A. For 25 mills or a total of 975 per pupil regardless of what their particular state equalized valuation per student may happen to be. The State under this formula, therefore, makes up the difference between that yield in any particular school district as applied to their state equalized value up to a guarantee of \$39,000 per student.

Q. Let's explore that a little bit. Is it not true, Mr. Pelham,

that in some communities like Woodhaven, Michigan the state [90] equalized value would be extremely high because of the concentration of industry in that community? A. That is correct. There are certain school districts, if the state equalized valuation per student per pupil exceeds \$39,000 that would mean that that school district would get no state aid under the general membership formula. It varies in relation to the state equalized valuation per pupil.

Q. In Detroit what has happened to the state equalized value? A. In Detroit our state equalized value has been decreasing very dramatically over the period of the last five years. Let me put it a different way, it has not been increasing as rapidly as has the state equalized valuation for the rest of the state. In the 1974-75 fiscal year the equalized value per pupil was 22,070. It is estimated in the 75-76 fiscal year it will be \$22,950 but I have here some charts that show very graphically the variations between the trend of state equalized value in the rest of the state and the City of Detroit. Here is one which shows a grand total property value for the State of Michigan and here it is for the City of Detroit. This starts with 1965-66 and goes through 1973-74. You can see the rate of escalation for the State and you can see for the City of Detroit it has remained relatively static.

• • •

[91] Q. Could you tell us for the record what the cause, if any, has been for, as you say, the stagnant condition of the Detroit equalized value? A. It has meant that the yield per pupil until the power equalizing formula came into being was constantly declining. The power equalizing does fend against this impact in that it guarantees the \$39,000 or \$39 per thousand for 25 mills for every school district in the State of Michigan.

Q. Mr. Pelham, could you tell the Court if you have an opinion as to why the Detroit state equalized value is remaining constant? What factors are involved? A. It's not remaining exactly constant, it is increasing slightly. As a matter of fact, it will go up slightly this year from \$22,070 per pupil to \$22,950. Part of the reason for that is, of course, that it is applied against a smaller number of [92] students to the actual increase is not as sharp as would be indicated by that kind of increase in SEV. The reason has been that for many years there has been an outflow from the City of Detroit to suburbia not only of individuals but of industry and in the case of industry it is related to the changes in industrial technology which requires a different type of plant, large square footage area plants on a single level rather than on a multi-story level. The space has not been available in the City of Detroit to provide for such plants so that as the older plants in Detroit deteriorated it became necessary to replace them and there was an exodus of industry out of the City of Detroit. The exodus of people from the City of Detroit has also brought an exodus of certain commercial institutions into the suburban areas of the metropolitan area and, of course, this in combination has had a very serious impact upon the City of Detroit as have a number of other factors including the huge amounts of acreage that have been carved out for the construction of expressways and the unfortunate experience that Detroit has had with the urban renewal housing where much of this has deteriorated and as buildings have been demolished they have gone off the tax rolls. These factors in combination are the reasons why Detroit's SEV has not increased in contrast with the rest of the State of Michigan.

. . .

[95] Q. To summarize then the 22.51 brings us about \$916 local and state aid? A. Right.

Q. If we had the benefit of the 2.25 for operating ex-

penses rather [96] than debt retirement we would have another \$45? A. Right, and if we had the additional .24 of a mill to bring us up to the full 25 mills it would mean an additional \$14.66 per pupil which would then mean we would be getting the full \$975.

Q. As matters now stand we get \$916? A. Per student, right.

. . .

[99] Q. Mr. Pelham, there is one other [100] figure and while we are on it I would like to have you point out on page 1 to the Court and Commissioner and to all here, I notice that the second column, there are two columns, let's look at the second column. It says total municipal millage equivalent, do you see that column, sir? A. Yes, I do.

Q. Next to Detroit how many mills are listed? A. 84.83 mills.

Q. Will you explain to the Court what that figure is, what does it constitute? A. It's made up of four major components. It includes the county tax at 7.07 mills. It includes the school millage which includes intermediate and community college millage of 28.14 mills. It includes Detroit property taxes of 30.16 mills, and it includes non-property taxes, income and excise equated into millage at the rate of 19.46 mills.

Q. That would include the tax on your public utility bills in Detroit? A. That's correct.

Q. You are telling the Court that the citizens living in the City of Detroit pay a total equivalent of 84.83 mills? A. That's correct.

Q. Including school tax? A. Including school tax.

. . .

[101] A. There are 15 other cities in the state which do levy an income tax.

. . .

Q. Looking at the total municipal equivalent on page 1, you have identified Detroit as 84.83. What is the next highest total municipal millage equivalent on that chart? A. Grosse Pointe with 56.46.

Q. Bloomfield Hills with 58.85? A. Pardon me, I missed that one, Bloomfield Hills 58.85 is the highest.

Q. Southfield has 49.54, is that correct, on that chart? A. That is correct.

Q. Rochester has 47.26? A. That's correct.

Q. Southfield with 49.54, their levy is 27.53 for school operating? A. Yes, and that is included in the 49.54.

Q. I would like to have you look at pages 2, 3 and 4 of the document and after you have examined the same could you tell the Court whether there is any other community that has as high [102] an equivalent millage as the citizens of the City of Detroit? A. Well, I don't have to examine it, I know that to be the case but this document demonstrates that. The nearest one to it is the City of Highland Park, I believe, at 82.83. I think it might be interesting to point out to the Court that the average for the entire state is 54.52 mills as against Detroit's 84.83 mills.

Q. So the average in the State of Michigan throughout our State including school tax, municipal tax, county tax that citizens pay is 54.52? A. Yes.

. . .

Q. As a factual basis isn't it a fact that in the State of Michigan as an absolute figure the citizens of the City of Detroit pay more millage than any other city? A. That is correct.

. . .

[103] Q. Those of you who are in public finance, is there a name that you apply to what I have been discussing the last few minutes with you? A. There is a name for the differential and this is normally referred to as overburden.

Q. Municipal overburden? A. Yes.

Q. Would you explain to the Court and to the Commissioner and myself and others what this means? A. Overburden, absolute overburden is the difference between the total property tax levied and I would like to make this distinction because the overburden as it is formulized for participation and overburden aid in the State is limited only to property taxes, so this would mean for the purposes of identifying municipal burden for statutory purposes it is a difference between the average levy of property taxes for the entire state as against the amount of taxes levied in any particular community which exceeded that and the difference between the two would be referred to as overburden. [104] For the purposes of the granting of overburden by the State, however, they allow overburden only in excess of 125% of the State average.

Q. This municipal overburden that we speak of and which has been demonstrated by Exhibit 30, do you have an opinion as to what affect, if any, it has on the ability of the citizens of Detroit to absorb any additional tax burden? A. I certainly have an opinion and I think it is pretty largely borne out by experience and by public attitudes that the tax payers of the City of Detroit feel, and I think we feel quite properly, that there is being levied against them a total tax burden which

is as high as or higher than they can afford to pay. The result is when the School Board which doesn't participate proportionately in this goes to the electorate seeking additional millage they are normally rebuffed. The only successful millage campaign we have had in the City of Detroit recently was, in my judgment, successful only because it was a substitute of a seven mills of property tax for the one percent income tax. I can't vouch for the fact it would not have passed otherwise but I know this was the issue which was made by those seeking its passage was to indicate that this was a replacement of another existing tax and it did pass but four recent elections that have been held [105] other than that, all three of the others failed and it is, in my judgment, in large measure because of the very heavy tax burden already being borne by the taxpayers of the City of Detroit.

Q. Turn to page 1 of Exhibit 30. When I look at the City of Birmingham I note that the district is directing 32 mills for operating expenditure but that the citizens in Birmingham are only paying a total municipal millage equivalent of 55.85. Is it fair to conclude that although the school district is getting a larger proportion of the millage the Birmingham citizens have a less tax burden than the Detroit citizens? A. Substantially so because if you deduct the school millage from the Birmingham total you come out with 23.82 mills which is for all other purposes, whereas if you do this with the City of Detroit you come out with 62.32 mills for all other purposes.

• • •

A. • • • As a matter of fact for the 20 largest cities in the State of Michigan the average city tax for all purposes, this includes both property and excise income tax or utility tax, the average for all Michigan cities is 15.90 mills. The average [106] for the 20 largest Michigan cities is 16.19 mills and the figure in Detroit is 49.62 mills. This excludes school tax and

county tax. In other words, Detroit is paying more than three times as much as the average for all Michigan cities and the average for Michigan's 20 largest cities.

• • •

[108] A. To explain these differences we examined the facts. The first fact that came to our attention was the fact that our per capita state equalized valuation in Detroit is 50% lower than the average for all of the 20 large cities in Michigan. In other words, if we had an equalized valuation at that average level that we could get the same yield from our property tax by levying 10 less mills because of the fact our state equalized value is lower than the average for the 20 cities, we examined per capita yield from city income taxes and for the other 15 cities that levied income taxes we found that our per capita yield was substantially lower and that if we were to levy our income tax with the assurance of an equivalent per capita yield we would get about \$31,000,000 more which is the [109] equivalent of about 5.30 mills. We examined certain services which are not common services in the other cities. The City of Detroit is the only city that maintains a full health department activity and the amount expended on this equates to 2.45 mills. We are not only the only city that operates a hospital although only very few of them do, but those others that operate hospitals are not providing any significant municipal subsidy. In the City of Detroit we are subsidizing the operation of the Detroit General Hospital to the tune of about 1.86 mills. There are certain functions of government which are not common to any of the other cities. The maintenance of an art institute and a zoo and historical museum which are all largely used by the residents of the entire southeastern area, there are a few cities with a civic center but none of the magnitude of ours. We subsidize our transit system and pay certain expenses of the Recorder's Court. These equate to about 3.10 mills. Actually our per

capita expenditure for police exceed the 20 city average by nine and a half mills and it might be asked what accounts for or what justifies this differential but in that connection I would point out to the Court that while this is true in relation to these cities in [110] Michigan which are all relatively small the per capita expenditure for police, fire and sanitation, and you will notice the next figure here is for sanitation, where we exceed the average by about 3.10 mills, the Detroit's per capita expenditure, police, fire and sanitation is \$1.09 per capita and this is exactly the same to the dollar as all American cities in the United States with a population of over 1,000,000. So it is apparent that costs for certain services are a function of size for various reasons including the economy scale, the spread of territorial area to be covered, the concentration of population, the constitution of population, but an examination of figures which were published by the United States Bureau of Census, city government finances in 1972-73, tables 4 and 5, it is easy to note that police costs for one are a function of size. In cities of less than 50,000 the per capita cost is \$23. When you get up to cities of 300,000 to 500,000 this jumps from 23 to 34. Between 500,000 and a million it jumps from 34 to 48, and in all cities over a million it jumps to \$63 per capita. It is also interesting to note that the cost of education is a function of size and there is a very sharp incline in the cost for education between cities of less than 50,000 until you get to cities of over a million. What accounts for this phenomenon I can't explain in detail.

. . .

[117] A. We recommend an SEV guarantee of \$44,000 with maximum millage at 25 mills which is the current level. I might explain, if you wish, part of the rationale for that: 1, in its recent action to increase the income tax there was agreement between the Governor and the state legislature that in consideration—

MR. McCARGAR: I will object to that and move to strike it. How does he know what agreement there was between the governor and state legislature?

THE COURT: It might be a public record, Mr. McCargar. How do you know?

A. I know it because it was published in all of the major newspapers in the State of Michigan.

MR. McCARGAR: Rank heresay, your Honor.

A. Well on the basis, your Honor—

THE COURT: Mr. Pelham, we have to call that rank heresay. The only ones I accept as not being rank heresay are some of those I am reading about this case.

A. In terms of rank heresay it has indicated—

MR. McCARGAR: Your Honor—

THE COURT: I have been watching some of them for the last few weeks and they have been very accurate so I am accepting them.

. . .

[120] Q. That would be fully funded under existing state law? A. Right. The alternate recommendation was for a 50 per cent funding. The rationale for that being that the State has funded it at a level this high in the past, in the 1972-73 fiscal year it was funded to the extent of 51.2 per cent of the formula but 50 per cent would bring the city of Detroit an additional \$18,787,000, and in addition to that we recommend that the unfunded portion be made available translated into mills for use in any general membership formula which might require additional millage.

. . .

(Cross Examination by Mr. McCargar)

[140] Q. Did you testify that the Detroit school district is now levying for school operating purposes the maximum amount that it can levy? A. The amount, the maximum amount that it can levy without a vote of the people, yes, that is what I testified to.

. . .

[143] A. It's on page 52: "In reviewing 1973-74 expenditure date it is noted Detroit had a current operating expenditure of some \$1115.60 which placed Detroit in 78th place out of a total of 531 K through 12 school districts."

THE COURT: 78 out of how many?

A. 531.

Q. Based on that figure you would say Detroit is substantially near the top, would you not? A. That is based upon all school districts that vary in size and I don't think the comparison there is significant because there is historical and factual variations in the costs per student which is a function of size. I think the comparison here with an average or an average ranking is meaningless.

THURSDAY, MAY 8, 1975

(Vol. VIII)

EDWARD SIMPKINS, having been duly sworn

. . .

(Direct Examination by Mr. Roumell)

[Vol. VIII 8] Q. Where are you presently employed?

[9] A. At Wayne State University.

Q. In what capacity? A. As Dean of the College of Education.

Q. How long have you been Dean of the College of Education? A. I am concluding my first year.

Q. Dean, could you tell the Court, please, what college degrees you hold and from where and in what subjects? A. I took my undergraduate degree at Wayne State University, a Bachelor of Arts.

Q. What field? A. A major in English and history and my second degree at Wayne State University as Master of Education, Secondary Education. My third degree as a Master of Educational Administration at Harvard and a fourth degree, a Doctorate in Educational Administration at Harvard.

Q. When did you receive your Doctorate? A. In 1971.

Q. After you were graduated from college could you tell us what jobs you had and where? A. In 1956 I started teaching in the Detroit Public Schools.

Q. At what level? A. The secondary level, at the Miller High School and I worked as a teacher of English at Miller High School for a year then I went into the Army, came out of the Army and was reassigned [10] to Northern High School in Detroit. I worked there for some five years and then I became a full-time officer in the Detroit Federation of Teachers. That was about 1965 and I worked there until 1968 and then went on to Harvard where I completed my Doctorate. Following that period I worked as Chief of Labor Relations in Philadelphia and during the interim I might point out I taught on the faculty at Tufts University.

Q. That is in Medford, Massachusetts? A. Medford, Massachusetts, yes. I taught at the faculty in the history department and following that or at the same time I was appointed Assistant Dean at Harvard Graduate School of Education and Director of the Center of Urban Studies.

Q. What was the function of the Center for Urban Studies? A. The Center for Urban Studies was a conduit through which funds flowed for various urban projects and there was a planning board that handled various grants that came through the university and we worked with various programs, generally of a socio-educational nature. . . .

. . .

[23] Q. Dean, you said these are sound educational programs independently of a desegregation plan. Now, the question I would like to know from you is whether or not you believe they should be included in the desegregation plan and, if so, why? A. I believe they should be included in the desegregation plan because the effort to desegregate has to have that going for it. The situations that were tolerable seem to become intolerable once integration becomes a part of the educational process. Right now people who don't have vocational educational programs probably, maybe they are concerned about it, but they are in no way as concerned about it as they are going to be when they are told their kids have to be integrated or bused. People who don't have a program in ethnic [24] studies are going to want to have a program in ethnic programs and studies, once they find out they have to mix with ethnic groups. Somehow this will tend to seem like a diminishing or diminution of their own ethnicity in the process. I say this because we have lived through it so many times before. The fact that a counseling program, maybe there is a counseling ratio of 300—or one to 300 within a school or one to 350 which is educationally unsound, we know that.

It becomes educationally intolerable generally once integration is made part of the total school program so you address yourself to, you certainly should address yourself to those educational issues that are sound and advantageous anyway whenever you take the desegregation step of the proportions that we are considering in this city, whether it is 60-40 or 70-30, there is going to be a need to address a number of educational issues that should have been addressed long before.

Q. What about testing, what part does that play, if any, in desegregation? A. In a number of school systems and certainly in the City of Detroit at one time or another we have had tracking systems built into the school systems and testing has been used as a device for segregating and isolating racial groups within schools. We know this has occurred. [25] Now, as I read the Detroit plan it addresses itself to making youngsters testwise, to testing, reviewing and retesting and I read it as a plan that certainly takes into consideration that old dodge of how to appear to have integration without having it, how to isolate youngsters within a school and although they go into the same building, as a matter of fact, having them as separate as if they were in two different schools. In addressing the testing question and the review question it seems to me that the Board has attempted to assure that even if the youngster finds himself in a classroom setting that an immediate test result might indicate he belongs in, there is going to be an opportunity for review so that he is not going to be assigned to that seat, that classroom setting on any permanent basis.

. . .

(Cross Examination by Mr. Atkins)

[99] Q. Now, let me just ask you a question relative to your testimony on testing which you said was an essential, I believe you said that it was an essential component to a desegregated

system or to words of that affect, is that a correct paraphrasing of what you said? A. I think that approximates it fairly.

• • •

Q. Let me try to rephrase the question. Is the reason for the importance of this component the misuse which has been made in the past of educational testing as it relates to black children? A. I think it's related to that. I think it's related to that and I'm not so sure that I would put an emphasis on misuse so as to connote that it was deliberate. I think that misuse also occurs simply because people are not reviewed. And there is a supposition that test results are [100] final and that they indicate something permanent and lasting about the individual. I think the components really addresses itself to that, if you're talking about review. I added that there is also some merit just in making youngsters test wise. I see that as a key component for youngsters anywhere, under any plan.

Q. Is there evidence that educational tests are culturally or racially biased and this has an impact on the children being tested? A. Allison Davis made that argument a long time ago.

Q. Who is Allison Davis? A. He is a sociologist and was probably one of the leading proponents of that theory and, of course, more recently there has been other psychologists making the same argument. I don't think there's any question but that the tests are, in fact, culturally biased. By the same token those cultural biases correlate very strongly with success in schools and ability to achieve the schools. My own perception is that probably that's not a useful road to pursue. I would not argue that whatever the biases are, I think that somehow youngsters have to learn to compete within the constructs of most of those biases. I think they have to learn how to do it.

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FRIDAY, MAY 9, 1975

(Vol. IX)

MARGARET C. ASHWORTH, having been previously duly sworn

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(Direct Examination by Mr. Roumell)

[Vol. IX 53] Q. You say they are necessary components for a desegregation plan? A. Yes.

Q. Why for a desegregation plan in Detroit? A. Well, in desegregation we are talking about mixing people, black and white children, in a school setting and mixing people of different cultures and races in a way that has not happened before, at least in the city of Detroit or even nationwide in the same way that we are describing the process.

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[55] A. The in-service training in the Detroit plan differs in many respects from the presently organized in-service training activities. When we bring black and white children together in a classroom certain kinds of problems surface that are unlike those that existed before. Teachers have to have specific training in terms of how they will relate to those [56] differences. In the event that black children have for the first time a white teacher, or vice versa, certain kind of problems exist. In the first place there will be tensions, there will be hostilities, there will be resistance to the change, something that we have had experiences with and research to back up and that has to do with how one relates to differences. • • •

• • •

[58] A. I am very much convinced that the present counseling and guidance program would be inadequate and a desegregated school system, the professional person who is responsible for guiding the adjustment of the student within that classroom or within that school would need to be retrained for the same reason I gave when I talked about the need for inservice training, that the guidance and counseling program will have to be revamped and I believe a prior witness has talked about the fact that at this point it's more of a disciplinary function as opposed to a guidance function and what we are saying is that in order to correct the inequities for the students and right the wrongs of students that that person has to be retrained and that program has to be revamped.

Q. You say "correct the inequities and right the wrongs of students." Specifically what are you referring to? [59] A. Specifically I am referring to counselors who have not understood the cultural differences, the racial differences, the life styles of students unlike themselves. In other words, I am talking more specifically as your Honor would want me to do and it's hard for educators not involved in education jargon but what I am saying is that students have been counseled in or out of certain programs based on their race. If this had not been so the Aero Mechanics would not be 84 per cent white in a school system that is more than 70 per cent black. The Counseling function is very important in that it will give the kind of attention to youngsters that will allow them to meet their potential.

Q. Does this mean retraining of counselors? A. This means retraining of counselors and restructuring of the present guidance and counseling system.

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[60] A. A special kind of counseling, your Honor, is necessary in order to be sure that there are no discrimination patterns

of behavior in terms of the way the counselor relates to the counselee.

Q. You are talking about black and white? A. Black and white or white and black because we have problems of race.

THE COURT: The system has counselors now? A. Yes.

THE COURT: You are saying you want to be sure— A. —that a counselor is giving fair treatment to all of the children.

THE COURT: In other words, you don't have a bigoted white counselor trying to operate in a system that is integrated, or a bigoted black counselor trying to operate in a system that is integrated. A. Or a counselor whose expectation of blacks are different from the expectations of the white students.

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[71] THE COURT: I grant that in five minutes the counselor will know—let's say the counselor knows in five minutes this young man is going no place academically; the academic phase of school is going to be such pressure on him he will drop out but the counselor also finds out that he is very proficient with his hands and he is going to make a good carpenter. Is there anyplace in this system that will take care of these potential dropouts?

• • •

[72] A. We believe and it is supported by a section in the plaintiff's critique that testing is very important in the desegregation effort in that adequately trained teachers and the administration of tests play a very important part in whether or not youngsters are admitted in certain curriculums,

whether or not they are tracked and particularly as it relates to placement in special education type settings.

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[73] Q. Yes. A. Often teachers take the test results—we will take achievement test results as an example and because the average test scores on the achievement test in a rank order might appear low in, say, reading which brings the average down when it's computed across the board those students are put in sections instead of allowing them to matriculate in a heterogeneous setting and that means fill them out at different ability levels in a different discipline. They are put in a track and left there without the attention being given to some of the other skills that they have and some of the other potentials. For instance, let me see if I can make that a little clearer: A child may have some difficulty in reading and have tremendous abilities in math. In looking at the reading score the teachers group the kids according to that ability in reading without respect to some competencies in math. Often the instructional program is not planned in a way that is most beneficial to that youngster so you have a group of youngsters with teachers where the teachers expect very little of them and they expect little of themselves and their potential in terms of academic skills are not given attention. This is true at the elementary level. • • • [74] We believe that the tests have not been normed on the culture of the various groups, particularly the black groups in that they are not culturally fair.

Q. Are you telling this Court that testing has been segregatory? A. Yes, I am, in my judgment, Mr. Roumell, and in the findings as we have looked at situations around the country we were particularly interested in the research done with Mexican American youngsters in San Francisco and because of language difficulties and because they could not cope with the standardized tests they were tracked into special edu-

cation sections which have very little to do with their ability to function as adequately in a normal classroom.

Q. Would it be fair to say that the testing component in the Board's plan is designed to prevent this type of segregatory effect? A. Yes, it would.

Q. Do you believe it necessary as part of desegregation? A. I believe it to be an essential part and a necessary part to make desegregation work and to correct the inequities that have come about as a result of testing practices in the Detroit [75] Public Schools.

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TUESDAY MAY 13, 1975

(Vol. XI)

FREEMAN A. FLYNN, having been previously duly sworn

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(Direct Examination by Mr. Roumell)

[Vol. XI 26] A. • • • No school system can survive without the support of its clientele, the parents and the children. I think Boston is an example of that. It will not survive given the conditions there. I realize that there is a constitutional responsibility to desegregate. I understand that. I support it absolutely but what I wish to see is the school system survive in the process and I wish to see as an individual, desegregation turned into true integration and I don't see how we can do that without the kind of functions I have described.

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WEDNESDAY, MAY 14, 1975

(Vol. XII)

STUART RANKIN, having been duly sworn

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(Direct Examination by Mr. Roumell)

A. • • • [Vol. XII 89] a white teacher who has been—or a black teacher, for that matter, who has been used to working only with black youngsters or only with white youngsters and my experience is limited to that extent and I may have, through my own background, certain prejudices or limitations, or in some other ways may not be as adequate to the job in a newly desegregated school situation as I might otherwise be, I am going to need some help. I am going to need some training, I am going to need to understand what happens when expectations are communicated to youngsters. You hit a key point. It is true that there is very strong evidence as reported in our report that the extent to which the teacher communicates to the student that the teacher expects that that student will learn well is an important variable in how the student feels about how well he is going to learn. And in turn, that is an important factor in how well he does indeed learn. And so, we have designed and we are prepared to carry out in-service education programs that will help our teachers understand and deal with the ideas of expectations. Now, that is not to say that expectations theory isn't important anyway. It is to say that it is doubly, or triply important in a desegregated school situation. So we have provided funds to deal • • • [91] a new situation or three schools that are grouped together in a cluster, the plan provides that those schools in-service education programs and their achievement program planning through those seminars we talked of, will occur jointly now in the new school situation and that any existing

plans will be reviewed to see if they, indeed, speak to the needs of the newly formed group of youngsters. Those are matters which seem to our Office of Desegregation terribly important and to our Board of Education. So, they are given prominent attention in the plan, sir.

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[94] THE WITNESS: One of the most important things to guarantee is that having desegregated the school, we don't resegregate the classes within the school through homogeneous grouping or other techniques that have been used over the ages in education for grouping youngsters. It's terribly important that we use tests for the right purposes, that we use them for diagnostic purposes, that we use them to judge whether the program is any good, rather than whether the kid is any good, and to that end it is necessary for us to give some additional training. This is not the same in-service education training about attitudes and so on. • • • [99] to do an effective job in working in a newly desegregated situation. By that I mean, increased awareness in the whole area of race, racial awareness, understanding of both likenesses and differences between and among races; new skills in inter-personal relations and new knowledge of what some of the research says about how students of different races that have been treated and in various situations in education in the past. I mean improvements of inter-personal communication so that teachers are better able and administrators, to work with the community, which is biracial. And I mean—I should say we mean there are bound to be some conflicts and the best kind of conflict, the best way to solve conflicts is to do it in advance, to do it in a preventive way and be alert to symptoms as they occur. And all of us will need some additional training to be alert to symptoms as they come, and to learn new skills in contract resolution. • • • [110] These tests are given annually. It is our belief that those people who give the tests

and those people who interpret the results of those tests, under a desegregated school situation, should have [111] some special training to make certain that the children's testing circumstances are just as perfect as they can be, that there is the appropriate readiness for taking the test that gives every advantage that is fair and no advantage that goes beyond, that the test administration is done the way it ought to be. But more importantly that the interpretation and results of these tests are used properly, not to channel kids in a situation where they may be grouped with youngsters who perhaps aren't learning as well or we might get some resegregation possibly. But we use those test results in a diagnostic way that we use those test results to determine the affect of the program so that we can change the program if it is not as effective as it ought to be and that they can do an even more adequate job of item analysis so we can learn from the test information that is there so that the placement—well, so that the interpretation that is made to the parents and to the pupils themselves, can be of a higher caliber. We think that these things are important anyway, but we think they are especially important in a desegregation situation. And that's the reason that the Office of Desegregation has included this component and the Board has approved it as part of the total package.

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THURSDAY, MAY 15, 1975

(Vol. XIII)

STUART RANKIN (Continuing)

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(Cross Examination by Mr. Dziamba)

[Vol. XIII 42] Q. What particular things then, in your opinion, have to be provided for in an in-service program in

a desegregated environment that are not presently in the existing program? A. The things that need to be provided for include training which will give the trainee, the teacher or administrator or counselor an improved understanding of race, of race relations, of racial understanding, a whole series of understandings in the area of racial awareness and racial understanding. Also the in-service education should provide [43] some skills in conflict resolution and in anticipation of conflict and along that line. Thirdly, the importance of dealing with all children fairly, equally, even handedly, those are some of the things that the in-service education program would do.

Q. You mean specifically with regard to race in this context? A. I mean specifically in regard to race, yes, sir.

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[56] Q. Can you briefly describe the difference between the existing program and the testing component in the Detroit Board's plan? A. The primary difference is that the testing component in the Board's plan is placed there to accomplish two ends, one is to be certain, to be doubly certain that the tests are administered in a fair, even-handed way, that the results are interpreted in keeping with the sense and purpose of desegregation, so that is one purpose; the other purpose is to provide useful and timely information to school administrators and teachers about the effectiveness of the learning programs so they can [57] make better decisions on improving those programs.

Q. Can you tell me what you mean by administering a test in a fair and even-handed way? A. It means that one needs to select tests which have been standardized on a population which includes minority as well as majority members. It means that students need to be provided a testing environment which

is not overly crowded and has a reasonable ratio between test administrators and monitors to pupils, that no deviation is made in the amount of time which is allowed for completing the instrument and items of that kind.

Q. Does it also include the giving of directions and the completeness of the directions? A. It does indeed.

Q. Does it include the attitude of the person giving the directions and administering the test? A. It does.

Q. In your experience and opinion does that have a race factor in it? A. I don't know.

Q. Maybe I can phrase it another way. In assuring that tests are administered in a fair and even-handed way is one consideration of that, as an educator, the way in which, for example, in a biracial situation the way in which the person [58] administering the test and giving the direction relates to people being tested? A. Yes, it's important.

Q. Have there been studies on that as to the difference of the race of a person giving a test and the person being tested? A. I believe there are but I'm not familiar with the results.

Q. In the aspect of interpreting the results with a sense and purpose of desegregation I believe you stated, what do you mean by that? A. We would not want tests to be used to regroup pupils in such a way that although the school was desegregated the learning situation or classroom group was segregated.

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FRIDAY, MAY 16, 1975

(Vol. XIV)

LOUIS MONACEL, having been duly sworn

(Direct Examination by Mr. Roumell)

[Vol. XIV 25] Q. Would you state your name for the record, please? A. Yes; Louis Monacel, sir.

Q. Where are you employed, sir? A. Detroit Public Schools, Detroit Board of Education.

Q. What is your position presently? A. For the past year I have served as Assistant Superintendent of Curriculum and Staff Development.

Q. Under your directorship of Curriculum and Staff Development would you tell the Court and commissioner what divisions fall under your supervision, what functions? A. Largely all in-service training that occurs in the Detroit Public Schools with the exception of the work Dr. Rankin carries out as he described in this court which is coordinated with the Office of Staff Development. In addition, the Office of Curriculum is [26] concerned with all aspects of school learning from kindergarten through 12, including all known aspects of learning within the curriculum of a local school. By that I mean kindergarten through 12th grade, all subject areas, physical education, language education and so on. Those are the general responsibilities that go with that kind of office.

Q. Dr. Monacel, what degrees do you hold from what institutions and what areas? A. Three degrees all from Wayne State University, bachelor of arts and sciences, master's degree in education, the doctorate in administration and curriculum development, all from Wayne State University.

Q. How long have you been employed by the Detroit Board of Education? A. Since 1950 or approximately 25 years.

. . .

[27] Q. After that what position did you hold? A. In the early '60s with the development of federal legislation pertaining to and recognizing the need for compensatory education in urban areas I began to direct compensatory education programs again in the so-called innercity of Detroit. Following that I became finally assistant superintendent of the Office of Federal, State and Special Projects and held that position for about seven and a half years until the recent reorganization of our school district which occurred a little over a year ago.

Q. Dr. Monacel, am I correct that the Office of Federal, State and Special Projects was organized for the purpose of exercising maximum effort to obtain federal and state funds, is [28] that correct? A. Yes, sir, that is correct and I am proud of the record I think we have attained in this city. The sole purpose of that office is to maximize the ability to gain additional funds, categorical or competitive funds for the children of this city.

Q. Dr. Monacel, I would like to refer you to the components, one of the components proposed by the Board of Education which is school crossing guards. A. Yes, sir.

. . .

[64] Q. You stated that this quality education is coupled with the desegregation plan? A. Absolutely.

Q. Could you tell us why it is? A. Sure. The Board of Education clearly believes that it wants to desegregate its schools and it wants at the same time and ought to want at the time an improved educational program for every child in

the school district. I think those, if I may say, those two things are inseparable.

Q. Would it be your opinion that in order to make the plan work this quality education is needed. A. Yes, sir.

. . .

[65] A. Absolutely need.

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Q. Why? A. My experience in education has proven to me that desegregated education is good and it is helpful in the educational process and Dr. Rankin has documented the helpfulness of desegregated education in the learning process but that is not enough and this document states that very clearly desegregating the school district is not enough. It must be accompanied by improvements, by quality education. There is no question that that is the case. We are also talking about the school district of the city of Detroit. We are talking about a virtually bankrupt school district, a school district that just two years ago begged to float an \$80-million bond because it had an 80-million dollar deficit; the school system that is operating on what we popularly call a suicidal budget; a school system that is offering really minimal education to its students. If that is the case and we desegregate, fine. I don't think there is an educator in our school system who doesn't understand desegregation is helpful to all children but to say that that act in and of itself is going to improve education in this city I believe to be ludicrous. You must couple that with the ability to improve and develop quality [66] education, I am convinced of that. I know the Board of Education is convinced of that, after all they submitted this plan to this court.

Q. Would it be fair to say that the plan is designed to create stability in the Detroit system? A. I think so. I am

convinced it's a good school district even though it's almost a war cry, a good school system does attract and retain families in any city. If the family knows there is good education going on down the street where that child goes to school or at the end of that bus route that that is a good school and there is quality education there, obviously that kind of familial satisfaction is a great plus in any city endeavor.

. . .

[67] Q. In the last two years by attrition, vacancies, death, resignation, could you tell the Court in your curriculum department how many persons you have lost? A. In the major curriculum areas we have lost 27 supervisors simply because we haven't filled the vacancies.

Q. Why is the Board asking this Court that they add seven language art supervisors in one department in connection with desegregation? [68] A. I don't mean to belabor the point but if we are going to ensure quality education coupled with desegregation these people are vital to do that and are a link to the other departments to the schools to the regions in order to do this. My job, Mr. Roumell, is to afford the school district service of all kinds in the area of curriculum and be a service agency as well as the leadership agency for the school district. You can't do that all by yourself, at least I have been unable to do that.

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MONDAY, MAY 19, 1975

(Vol. XV)

LOUIS MONACEL (continuing)

. . .

(Direct examination by Mr. Roumell)

[Vol. XV 13] Q. Doctor, you indicated last Friday that prior to you assuming the present position that you had that you were in charge of the Office of Federal and State Assistance, is that correct? A. That's correct.

Q. In that connection did you become familiar with what is commonly known as ESAA? A. Yes, at that time I was quite familiar with ESAA.

Q. What is the name for ESAA, the official name? A. Emergency School Aid Act.

[14] Q. Public Law 92-318, 92nd Congress, passed in June, 1972, is that correct? A. That is correct.

Q. Could you tell us what the purpose of the act was as announced in the act itself? A. Yes, I believe the Congress of the United States with the approval of the President recognizing the necessity of legislation helpful to school districts around the United States who are engaging in the act of desegregation, the purposes of the act clearly delineate that kind of assistance. If I may, the first purpose is to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools. To encourage a voluntary elimination, reduction or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students and, to aid school children in overcoming the educational disadvantages of minority group isolation. It goes on to state and I think very importantly for the Detroit Public Schools on page 24, that once a school district is eligible it may submit developed proposals for virtually every area of education improvement that we have [15] spoken to in this court, with the exception of

transportation, and if I may, Mr. Roumell, the act states that you can submit proposals for special remedial services, for professional staff, for teacher aides, for in-service training, for counseling, for new curricula, for minority language, for career education, for career activity, administrative services, for planning and evaluation and bilingual education. Once eligible constructive proposals approved by the Chicago office of HEW certainly permit and encourage these kinds of activities in a school district undergoing desegregation. It seems to me then that there is recognition in the Federal Government particularly in the Congress of the United States that educational improvement must be enhanced and coupled with any school system that is desegregating.

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(Cross examination by Mr. Dziamba)

[88] Q. So that the curriculum design as it is termed here on page 229 is essentially continued in the same form as it presently exists.

THE COURT: How does this component fit into the desegregation plan? A. Your Honor, Friday I was speaking to the curriculum within the confines of the budget and I was trying to explain that to carry on all programs or many, many of the programs that could be created from this desegregation plan leadership people are needed, curricular leaders are needed, supervisory folks are needed with their specialties in various areas as outlined in this document. I also, I guess, told the sad story of the fiscal dilemma of the school district which today precludes those numbers of people carrying on in those leadership roles.

• • •

Q. You testified to this curriculum component Friday and I still don't know how it fit in with the desegregation plan.

[89] A. I could only repeat that in order to lead, control, assure that the program described here will be on-going in every school under this plan that these kinds of people are needed within the budget of curriculum to make those assurances.

• • •

[92] Q. The administrative and supervisory leadership in the area of language education has been drastically depleted because of employment of staff incident to desegregation since the fall of 1971 and incident to the retirement of the divisional director in December of that year. That just is proffered by the Board really and has no relation to desegregation, does it? A. I testified Friday, sir, that if we are to improve the educational life of the children in this school district and at the same time desegregate there must be a serious [93] improvement in public education in this school district. The page you relate to to me indicates, indeed, for the improvement numerically and staff for our school district, I also will not belabor, in that I think I already belabored it on Friday that this is probably the most economically depressed public school system in America and Detroit as a city ties that record or is approaching it with I believe that what is obvious, that it is absolutely related to a successful desegregation plan.

Q. What factors in your experience have led you to that conclusion? A. The factors in my experience are these: For the last five years and nearly for the past decade I have watched an excellent school district decrease in its capacity to deliver educational services to its several hundred thousand or more children for lack of physical ability to do so. I have seen a school district ripped with teacher strikes that has further deteriorated the ability to deliver services and a series of other economic depressing events in Detroit. To that extent it seems to me when you add a new factor, a new historical event in this city such as desegregation it must be bolstered

by improvement in the school district. Desegregation in and of itself is an improvement factor there is no question of that but in our case, in our town and with the unique horrors of this town [94] in terms of the economic dilemma, I submit everything that we speak to as improvement is vital.

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(Redirect examination by Mr. Roumell)

[120] Q. Now, on the curriculum component I'd like to ask you this question. Assuming appropriately—I want to rephrase that, Your Honor. I apologize. Assuming that the Detroit Board had about the same budget that it had to work on that it has now to work on next fall, and assuming for the purposes of this question only, that there was no desegregation plan, could you, with your present staff, be able to supervise a curriculum in Detroit? A. Presuming no desegregation plan?

Q. Yes, sir. A. Yes, within the framework of the declining budget, declining quality of education in this city because of budget [121] problems, it could be done.

Q. Now, Dr. Monacel, assuming the same budget in Detroit, but there is ordered a desegregation plan, be it either in the form of the plan of the Detroit Board or in the form of the plaintiffs, could your office supervise the curriculum activity with the present staff? A. No, sir, I don't believe we could.

Q. Would you tell the Court why? A. The very nature of the plan or plans, whichever plan, I think they both include considerable pairings of schools. When that occurs, it seems to be all kinds of educational things follow. If the school has been K-6 and it is now K-3, if the other schools had been K-6

and it's now grades 4, 5 and 6, there's all kinds of updating information, updating material, all kinds of assurances that there are controls of that program, that all is well, that a good learning situation is there, the supervisory function must be increased in those instances. Therefore, I do not believe that the current supervisory leadership staff could do it.

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CHARLES L. WELLS, having been duly sworn

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(Direct examination by Mr. Roumell)

[159] A. Because we feel that this counselling support is necessary to relate educationally to the adjustments required in desegregation.

Q. Would you explain what you mean by that. A. All right. I think that there are two areas that need to [160] be considered. Number one, the way in which students adjust to school to an appreciable degree, will determine what they get out of school. The fact that under desegregation we will be moving students in attendance patterns that are different from those that they have experienced in the past will place some pressure on the school district in terms of the adjustment of students to school. Secondly, if we want to make that educational experience a meaningful one, then they are going to need assistance in terms of how they academically progress in school and the career and other educational opportunities that are available to them.

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[166] Q. I see. Now, let's talk about this counselling function. I want to refer to the aero mechanics. There has been some concern expressed by plaintiffs on this record about the

racial ratio of black students at the aero mechanics. Mr. Wells, in your experience and your opinion, could you tell us whether guidance and counselling could have been of assistance in correcting— A. Obviously guidance and counselling could be of assistance of correcting this problem.

Q. In what way? A. In two ways. Number one, as we are dealing with black students, we have to recognize that for a number of reasons, black students have either not been made available—made aware of career opportunities, or they have assumed that because of the lack of black persons in certain careers that it serves very little useful purpose to prepare themselves for those careers. Obviously then, the concentration in guidance and counselling to answer [167] these kinds of concerns to black students, particularly in a school district as large as ours, it is my belief would have resulted in a greater number of black students in this program. I must say, on the other hand, that as I have reviewed the statistics, there has been a gradual improvement over the last three years in terms of the number of black students that are in Aero Mechanics.

Q. Let me ask you this, Mr. Wells. In terms of the proposed 4 Vocational Educational Centers, would guidance and counselling play a part in encouraging both black and white students to go? A. Guidance and counselling would play a very important part. As a matter of fact, you could not have this kind of vocational program that would be successful without a strong guidance component, for several reasons. One, I have alluded to and that is the idea of making students aware of occupational opportunities and assisting them in choosing the curriculum that will prepare them for that kind of training. In view of the fact that this would be a cooperative kind of program—when I say cooperative kind of program, where students would be involved in both the vocational program and the curriculum within their base school. Then, there needs

to be communication between the two facilities so that the [168] student on one hand is prepared to either obtain additional vocational training, if necessary, beyond what the school district offers, or if he needs training, it prepares him to go immediately into the world of work. That kind of programming is essential for him or her in that school. In addition, one of the things that I think we have to be concerned about is the awareness. The trying to get 16 and 17 year olds to decide a vocation for themselves that locks themselves in at this young age is inappropriate. And therefore, they have to be assisted in obtaining an adequate curriculum in the comprehensive high school so that if at a later time, they change their mind about that particular vocational pursuit, they are not left without a base to go into some other area of educational pursuit. And finally, in view of the rapid changing technology in many vocations at this time, there is a need for communication between the school system through its guidance department and the areas where students will be looking for employment to make sure that the educational program is really relevant to the needs of the individual in terms of their vocational pursuit.

Q. Would this also be true in encouraging youngsters, both [169] black and white, to attend the two new proposed technical high schools? A. Obviously.

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A. • • • [170] place additional stress on a school where you can assume that there will be a degree of adjustment problems, then your need for an adequate and appropriate guidance and counselling program becomes much more evident and necessary.

Q. Now, when you say additional stress, what stress are you referring to? A. I'm referring to the stress of desegrega-

tion. At any time that you take individuals, whether they be children, youth, adult, out of what they have considered a normal pattern of behavior and activity and change that in another direction, you're going to have some degree of stress. Some individuals will be able to handle this with minimal difficulties. It will create significant problems for others.

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TUESDAY, MAY 20, 1975

(Vol. XVI)

MICHAEL J. STOLEE, having been duly sworn

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(Direct Examination by Mr. Lucas)

[Vol. XVI 92] A. All right, sir. In my opinion, the most important single component that's in there is the section on in-service training. I have read the back of the document what the School Board has had to say, and it is my opinion that their statements reflect accurately, as I know it to exist [93] on the national scene and that the program they are presenting makes sense. It would be a good way to handle it.

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[110] A. • • • There are things schools should be doing regardless of desegregation. However, we have not yet satisfied ourselves, and I believe the Board addresses itself to this point, that these tests given are culturally free. I should say free of cultural bias, or free of ethnic bias. And that continuing efforts must be made to develop a testing program that really measures what it is designed to measure, rather than a child's ethnicity. • • •

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A. • • • [127] It would seem to me that any great school system could well afford to develop some of its quality education programs in the fields of reading.

Q. Is this an area which children have been victims of discrimination often suffered the greater difficulties? A. It is.

Q. Is this an area that many school systems involved in desegregation have concentrated their resources? A. It is.

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(Cross Examination by Mr. Roumell)

[131] Q. • • • Would a high school counsellor discuss career guidance with a student in a high school? A. Yes.

Q. And would it be your recommendation that a high school counsellor could be helpful in encouraging both black and white students to enter a specialized school? A. Yes.

Q. Would this be a method by which we could increase the percentage of black students going to a specialized school such as the Aero Mechanics? A. Yes.

Q. And how would the counsellor be able to do this? A. Well, through the techniques of counselling and the informational services available to the counsellors.

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TUESDAY, MAY 27, 1975

(Vol. XIX)

GORDON FOSTER, having been previously duly sworn

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(Direct Examination by Mr. Atkins)

[Vol. XIX 36] Q. Dr. Foster, on the basis of your experience with school systems in the process of desegregation, has reading programs—has a reading program been shown to be an important aspect of facilitating desegregation? A. Very definitely so. I think, as I testified earlier, we don't make these decisions, the School Boards develop what they call in the trade, a needs assessment which sets out to define exactly what it is they need. And then they have these on a priority basis. And both in our work at the center and in the funds that are requested through the Emergency School Assistance Act for the Federal Government for desegregation, the Florida District [37] perceives this to be perhaps their highest priority item. For example, in the Emergency School Fund, Broward County put their entire pot of over a million dollars into a reading program. Dade County put also over a million dollars and approximately three-fourths, I believe, of their Emergency School Funds into their reading program. And several other districts have followed similar patterns.

Q. On the basis of your own expertise, what is the importance, if any, of reading to a desegregating school system? A. Well, as in most educational problems, for concerns, the desegregation process often exacerbates difficulties in the current educational program that sometimes aren't seen as clearly in a segregated situation. But when you throw children, especially at the advanced grades from widely different preparation backgrounds, children of considerably different achievement, teachers are in very dire straits on how to deal with a roomful of children that have very wide achievement ranges. And this is one of the perceptions that they have of being a most difficult problem. It's very obvious that if you have a child, for example, in the 5th or 6th grade who is reading at the 1st and 2nd grade level, that none of the subjects in that grade can he adequately cope with because reading is the foundation

for the whole business. [38] So, our program, in helping counties with reading, are geared primarily to two things. One is the remedial function of how to save these children that are in a secondary school or upper elementary school. And we find that pretty difficult because many of them have gone so far that to resurrect their reading skills is just plain difficult. I think over a long range period we're much more optimistic about spending money and helping districts with what we call early identification programs both of reading difficulties and learning disability problems. And if they catch the children at an early enough age in the school process, there's much more hope to getting those things straightened out.

Q. Is the importance of a reading program or reading component related to testing in any way? A. There's a very high correlation between any pencil test and reading ability. I mean, if you can't read, then you aren't going to do very well on the test, obviously.

. . .

[45] THE WITNESS: Let me cite a quick example. We have an accepted program with one of the big high schools in Miami which is desegregated, Jackson High School, and they just had a finding that needs assessment which indicates that something like 70 percent of their pupils in the senior high school are reading at maybe the 4th or 5th grade level. Now, obviously, this becomes a very important disciplinary matter because the pupils sit there and they can't do anything. They can't relate to what's going on in the classroom. Just as important, becomes the fantastic problem, in terms of faculty morale and staff morale. And we've been working all year with their reading language arts people because secondary people are very poorly trained in terms of reading. They're discipline oriented in terms of math or history, or what have you and don't want to be bothered with reading because their opinion is that the kids ought to learn to read at the elementary level.

But the truth of it is they aren't able to deal with that kind of a problem in Jackson High School and some others.

MR. ROUMELL: Your Honor, I move to strike the answer. It has nothing to do with Detroit, [46] what they are doing in Jackson High School.

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WEDNESDAY, MAY 28, 1975

(Vol. XX)

GORDON FOSTER (continuing)

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(Cross Examination by Mr. McCargar)

[Vol. XX 178] Q. Doctor, this case was remanded to this Court—

THE COURT: Are you sure about that?

(continuing)—for further proceedings consistent with this opinion leading to a prompt formulation of a decree directed [179] to eliminating the segregation found to exist in the Detroit city schools. In your opinion, based upon your expertise, does the plan that you prepared and filed with the Court do that? A. Yes, sir, I believe it does.

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THURSDAY, MAY 28, 1975

(Vol. XXI)

CHARLES E. WELLS, having been previously duly sworn

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(Direct Examination by Mr. Roumell)

[Vol. XXI 155] Q. Mr. Wells, in the plan of the Detroit Board of Education, there is a provision for four vocational high schools and two technical high schools. Referring to the vocational schools, can you tell the Court what part, if any, counseling and guidance could play in that desegregation tool? A. Counseling and guidance can play an important role. First, in assisting students to make appropriate academic choices in many instances which would result in their attendance in a technical or vocational school. In addition to assisting them in selecting the area or field, they would also assist them in choosing the kind of prerequisite program that would help or be necessary for successful study in that particular school. Finally, they would, could and should act as a liaison between the vocational school and the comprehensive high school to make sure that the curriculum that was taken in the comprehensive [156] high school really is meaningful in terms of what is required for success in the vocational and technical school. And finally, they should be able to do follow-up work with those students when they have completed their vocational and technical training so they can relate then to the curriculum of the technical and vocational school to determine whether or not it has been relevant in terms of the needs of the students when they enter the world of work.

Q. Could counseling and guidance serve to encourage both black and white students to enroll in those vocational schools? A. It could do so in two ways. One, as I have alluded to earlier, it could make information about career opportunities available to students so that they would choose to involve themselves in the offerings of the vocational and technical schools. And also it would point out to the students and be helpful in getting them to recognize that that kind of training could lead to a successful pursuit when they had completed their training.

Q. And that would apply to black students. Am I correct?
A. That is right.

Q. It would apply to white students. A. It certainly would.

[157] Q. Would it be fair to say that to black students the counselor could point out the opportunities in such fields such as construction and auto mechanics and so forth? A. I think the only difference as it relates to black or white students would be that it would be probably that the counselor could enlarge on the possibilities for meaningful pursuits on the part of the black students by providing them with information that might not have been available to them from any other source.

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FRIDAY, MAY 30, 1975

(Vol. XXII)

ROBERT L. GREEN, having been duly sworn

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(Direct Examination by Mr. Lucas)

[Vol. XXII 45] A. Yes. When we examined the data for the NAACP here, I believe, two, two and a half years ago, when we had first-hand awareness of that data, there was a significant discrepancy between the general achievements, specifically in the reading area, between black and white youngsters here in the City of Detroit. And I would guess that the gap or the difference between the two groups yet holds.

Q. You have not yet studied in any way the educational components of the Detroit plan. A. No, I have not.

Q. Would you, Dr. Green, as one of the techniques of dealing with the educational deficits resulting from segregation, [46] recommend to the Court that a remedial program be included as a part of the desegregation process? A. In the reading area?

Q. Yes. A. Or remedial in general?

Q. Remedial in general but in particular the reading area.
A. Yes, I would say reading is one of the most critical problems facing minority youngsters throughout the country, and the effect can be found at every level, from the second grade level through the university level. Minority youngsters that we even find at Michigan State University who had not been afforded a quality desegregated education often lag behind their white counterparts at the university level which requires remediation at that level. And we have very strongly taken the position that the remediation should occur at the public school level long before students become involved and enroll in university programs. But the effect is broad, not only in terms of university programs but trade programs, non-university related, at the same time, but post high school, post tenth grade.

Q. Dr. Green, I take it every urban school system has a variety of educational needs and deficits. But just so it's clear on the record, is it your testimony that the reading deficit is directly attributable, in your opinion, to factors [47] involving racial discrimination in schools? A. Yes, that is true.

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MONDAY, JUNE 2, 1975

(Vol. XXIII)

CHARLES E. WELLS, having been previously duly sworn

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(Direct Examination by Mr. Atkins)

[Vol. XXIII 78] A. One of the basic responsibilities of the guidance and counselling program is to make students aware of various vocational opportunities, to get them involved in both the study and pursuit of those vocational programs in which they have interest. And then to handle the necessary transfers and rescheduling in a vocational program. So, from that standpoint, I think that the role of the guidance counselor would have an important impact on the desegregation of programs involving vocational training.

. . .

[86] A. . . . You are moving a significant number of students where new peer relationships have to be established, where they are new in the schools. And this will require some adjustments on the part of these students. The guidance counselor, again becomes the individual who has to assume the responsibility, both from the standpoint of time and training, to assist students in dealing with this type of adjustment process.

Q. This is the adjustment process that you're suggesting may be the result of moving children as a result of a desegregation plan? A. I'm not suggesting it, counsellor. I know it will occur. When you move children in these large numbers, whether it be for desegregation or some other purpose, you are going to have an adjustment process the student has to go through.

Q. An this is not an adjustment process that is going on in the Detroit schools currently? A. No.

Q. Do you mean that the elementary counsellors are needed for desegregation? A. I definitely do.

. . .

(Cross Examination by Mr. Dziamba)

[135] Q. You testified earlier, Mr. Wells, that there was a certain number of dropouts annually. A. Yes.

Q. From the Detroit system. Do you remember what that testimony was? A. Yes. For 1973-74, there were 9,925 out of 76,288. This was for the tenth, eleventh and twelfth grades.

Q. That was approximately what percent, if you can figure that out? A. I'm sorry, that was out of 70,785.

Q. 70,785? A. Right. And if my figures are correct, that's 14.02 percent.

[136] Q. What, if any, role does a guidance counselor play with respect to these students? A. The guidance counselor is expected to play a role with these students both in terms of providing counseling and guidance service to them throughout their secondary career and also, if at all possible, immediately prior to their physically becoming a dropout. Again, we have the problem of the counselor's availability to do this. We do know from experience that in several schools where that opportunity—where the counselor is able to devote the time to these kinds of problems—we can recognize an impact.

Q. What kind of impact? A. That the dropout rate is lower.

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TUESDAY, JUNE 3, 1975

(Vol. XXIV)

CLEMENT SUTTON, having been duly sworn

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(Direct Examination by Mr. Roumell)

[Vol. XXIV 103] Q. • • • Can you tell us whether or not the Detroit Board of Education receives any State aid for in-city transportation. A. Yes, we do receive State aid reimbursement for certain in-city transportation costs.

Q. How long has the City of Detroit been receiving in-city transportation reimbursement? A. This is the second year that we have received some reimbursement from the State.

Q. Referring to the 1974-75 school year? A. That's correct.

[104] Q. And prior to the 1973-74 school year, are you telling this Court that the City of Detroit Board of Education did not receive reimbursement or in-city transportation? A. That is correct, we did not receive reimbursement for in-city transportation.

Q. Now, Mr. Sutton, do you know whether prior to 1971, the State was reimbursing the transportation costs of rural districts? • • • [105] A. Would you repeat it, please.

Q. My question is whether you know if prior to two years ago rural districts of Michigan were receiving transportation reimbursement aid from the State of Michigan? A. I believe the districts such as you mentioned were receiving such reimbursement, yes.

THE COURT: Are you sure?

THE WITNESS: I am sure that they were receiving such reimbursement.

THE COURT: Rural areas?

THE WITNESS: That's correct.

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[126] Q. Mr. Sutton, will you tell the Court if you would, please, what the projections are on the budget that you're preparing? A. In looking ahead to 75-76, in terms of our preliminary expenditure requirements, in total dollar terms, we're looking at the proposed budget of approximately 314 million dollars. Now, that's to be compared with a budget in the current year of 74-75 of about 280 or 285 million dollars. Now, the increase there, between 74-75 and 75-76, an increase of about 30 million dollars is due, primarily, to meeting the additional costs of doing business without really any enhancement or improvement in terms of programs and services. When I mention increased costs of doing business, this refers to meeting contractual commitments in terms of salary increases, paying our normal salary and wage increments for employees which become due next year, meeting the increased costs of the non-salaried items in our budgets, such things as utilities, text books, supplies, materials and other goods and services, goods of that type. We are also projecting in our [127] preliminary budget, the restoration of certain services that had been eliminated from the budget two years ago in 1973-74. Now, these services fall in four or five major categories, substitute services, text books and supplies, and two or three other categories. Now, when we actually come down to adopting budgets on July 1, I'm sure that there will be some determination made by the Board as to which of these services

will have to be cut back in order for us to operate again within a balanced budget.

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[128] Q. All right. Now, does the 314 million dollars projection, does that give you a balanced budget based upon the projected income? A. No, it does not.

Q. I take it then, it gives you a deficit? A. That's right, at a level of 314 million we would be looking at a potential deficit somewhere around 28 million dollars.

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[129] Q. If the proposed budget was adopted, based upon the continuation of present services and some restoration, do I understand it that you would be spending next year, 28 million dollars more than you're taking in?

MR. McCARGAR: Objection again. They're not taking anything in, Your Honor.

THE COURT: Overruled.

THE WITNESS: That is correct.

Q. Now, of that 28 million dollars, how much is allocated to restoration of services? A. 7 and a half million dollars.

Q. And this is the substitutes and the text books? A. Yes, certain other items, building operation and maintenance, equipment, filling certain custodial positions that have been required by union contract and certain other instructional and support services that were cut out of the budget in 1973-74 as an emergency measure, to maintain a balanced budget that year. So really, in terms of restoration, we would only be

talking about reverting back to the same level of services that we were providing in the original 1973-74 budget, not to speak of the cutbacks that have been in effect and have been continued since the institution in 1971 of the survival plan. We have made no [130] provision for restoring any of these services and we just count down the damage there by not being able to.

Q. Well, when you speak of substitutes, restoring substitute service, will you tell the Court what you mean? A. Yes. In the area of substitute teachers, we just simply do not have a large enough budget to provide all the substitutes that are needed on a day to day basis. We have anywhere from 100 to 150 unfilled substitute calls a day. That means that these are classrooms that do not have a substitute teacher covering that class. Now, what happens in those instances is that there would be either an assistant principal or some other administrative person in the school that covers the classroom in the absence of the regular teacher.

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Q. Now, you mentioned text books. What are you referring to there? A. The budget appropriation for text books and supplies in the current fiscal year 74-75 is about one-half of what it was in the 1970-71 budget because in January of 71, the [131] Board imposed the survival plan, and the budget for text books and supplies was cut from about 7.2 million dollars down to approximately 4 million dollars. So, now we're operating at 4 million dollars. The inflationary increases that have occurred since that time, makes that budget not simply one-half of the 70-71 budget, but probably about one-fourth of the 70-71 budget. The purchasing power of the State of Michigan, number of dollars—

Q. According to Exhibit 6, you had 289 thousand students, 457, and in 74 you had 257 thousand. You don't have one-half

the number of students now, do you? A. Certainly not. And of course, costs have gone up disproportionately to that drop in enrollment.

Q. Am I correct that under State law, the Board of Education has to furnish free, supplies and text books to all pupils? A. That is correct.

Q. And the 7 million dollars you're talking about restoring, the cuts from 73-74 budget would go to text books and supplies? A. Yes, in part.

Q. Plus substitutes? A. Plus substitutes, plus equipment.

Q. I want to talk about building and operations. What are you talking about restoring there? [132] A. In that area, we'd be talking about providing adequate maintenance for grounds, for just simple things like grass cutting, maintaining our athletic field. We've got painting of buildings that at one time were supposed to be on a five year schedule. It's now on a nine or ten year schedule. We'd be talking about trying to improve our schedule on building maintenance in the painting area. We would also be talking about providing more timely maintenance to just things like repairing roofs, repairing toilets, other things of this nature, that because of an inadequate budget, we've just not been able to do on a timely or responsive basis. And of course, this contributes, frankly, to the health and safety of the children.

Q. And you're just restoring this to 73-74? A. That's right.

Q. You mentioned the survival budget of 71-72. Is it my understanding that this budget is continuing on? A. Yes, it is. It started in January of 71 and that year, about 16 million dollars was cut out of the budget. And since that time, we

have not been able to restore any of those services. We have continued those cuts. There have been additional economy measures instituted since then and, of course, the most recent one was the emergency cut in 73-74.

[133] Q. Does that include the failure to fill positions like in curriculum supervision? A. That's right. A number of positions have gone unfilled and we have saved—we have realized savings by attrition and leaving positions vacant. And in many cases, these are positions that are very important, really, in terms of providing educational services to youngsters.

• • •

Q. Now, going back to the budget as it is now proposed. If you did not restore the cuts of the 73-74 budget, which in turn was already a survival budget, then we would get [134] down, do I understand it, to a deficit of 21 million dollars? A. That's true.

Q. Now, I would like to know if, as the Chief Fiscal Officer of the Detroit Board of Education, you are telling this Court that for the coming year, in order for the Board to continue its current reduced program, taking into account the some 8 thousand students attrition, as matters now are projected, you're projecting a 21 million dollar deficit? A. That's correct.

Q. And it would be 28, if you restored the minimal services? A. That's correct.

MR. ROUMELL: Pardon me, Your Honor.

Q. Mr. Sutton, based upon our just completed discussion, could you tell us whether the Detroit Board of Education can financially continue a balanced budget and keep the same

services it had in 1974-75 school year, finance any additional transportation over that which it is doing now? A. No, we cannot.

Q. Can you tell us whether or not, in restoring the in-service component of the Board's desegregation plan, in-service for the purposes of training teachers and staff in relation to desegregation, whether or not the Board, within its [135] current projected budget, is able to provide the funds and continue its current level of services to the students in the Detroit school system? A. We certainly can't, no sir.

Q. Could it provide—the budget calls for 4 million 200 thousand dollars. Could it provide that for in-service training and keep the same level of services? A. Definitely not.

Q. And when you make that answer, you are factoring in the 8 thousand children that, based on our previous projections, would not be in the system? A. That's correct.

Q. Could it provide 250 thousand dollars and continue the present level of services? A. No, we couldn't provide anything above and beyond the present level, if we can even do that, next year.

Q. What do you mean by that? A. Well, we're talking about a potential deficit of 20 million dollars.

Q. Without restoring service? A. That's right. We're talking about a requirement to adopt a balanced budget. So, between now and July 1, we're going to have to close that gap of 20 million dollars some way, some how and we're already operating on a bare bones budget. [136] So, we certainly can't increase anticipated expenditures next year when we don't even know where we're going to find the money to just continue what existed this year.

Q. Would that apply to funds for four additional vocational centers? A. That would apply to those funds and any other funds, any other requirements.

Q. So, you're telling the Court that any of the components that the Board has proposed in the transportation as matters now stand, the Board cannot continue its present level of services to the Detroit children and finance any of the components in this plan, is that correct? A. That's absolutely correct.

Q. And that includes the transportation component, is that correct? A. Yes, that is correct.

• • •

[138] Q. And Mr. Sutton, so the record will be clear, last year did you end up with a surplus in your budget? A. Yes, we did have a budgetary carry over at the end of the 73-74 school year of approximately 5 and a half million dollars.

Q. What did you do with that? A. Those monies budgetarily are considered as available resources for allocations. During this current fiscal year, we have allocated much of that and by the end of this fiscal year, all of those funds will be allocated to necessary expenditures incurred in 74-75 that were not anticipated at the beginning of the year.

• • •

[143] Q. Mr. Sutton, going to Exhibit 40. We have identified it as the Millage Votes since 1966 to '74. Now, in that period we have had nine votes. One, two, three, four, five, six, seven, eight, nine, according to this chart. A. That's correct. If I may clarify your addition. On a couple of those votes, there were two, actually two proposals on the same ballot.

Q. You're speaking about five seventeen in August of '72? A. That's correct. There were two questions on millage at that time.

Q. That was in May, '72, we have a renewed five mills for two years? A. That's correct.

Q. And that was voted down, is that correct? A. That's correct.

Q. And in also the same time you add five mills for two years. That was voted down? A. That's correct.

Q. So, in that particular case, you have a renewal and an addition of five? A. Yes.

[144] Q. Both were voted down? A. Yes.

Q. So, of the total of ten propositions in eight years, during this time, seven of those propositions have failed, three have passed. A. That's correct.

Q. And September, '73, you had a passage of replacing the 1 percent income tax with seven mills for five years, is that correct? A. Yes.

Q. And this 1 percent income tax, you were permitted to levy that by virtue of Public Act 1 or 2 of '73? A. Correct.

Q. And then you had a renewal of 7.5 mills for ten years? A. Yes.

Q. And the last—and that was in March, '74. Then in August '74, the Board went back to the citizens for an additional five mills? A. Yes.

Q. And was that defeated? A. That was defeated, yes.

• • •

A. • • • [146] In Detroit, the county taxes, as shown 7.07 mills, the State wide average is 6.18 mills. So, Detroit is about 14.4 percent higher in that category. For school taxes, this is the local, the intermediate school district as well as the community college. Total millage in Detroit 28.14 mills against the State wide average of 32.42 mills. So in Detroit, school taxes are actually lower than the State wide average by about 15.2 percent. Looking at the municipal taxes, municipal property taxes, city of Detroit in terms of the school district here, the village township taxes on the State wide averages as well as other municipalities, 30.16 in Detroit, 12.24 State wide average. Detroit is about one and a half times higher than the State wide average in terms of local taxes, 146 percent higher. So, looking at total property taxes, Detroit taxpayers pay 65.37 mills as compared with 50.84 mills as a State wide average or 28.58 percent higher. Extending that down into non-property taxes shown as a millage equivalent and for Detroiters that would relate to the 10 percent personal income tax as well as the utility taxes [147] which amounts to another 3 mills, the income tax is about 16 mills, utility taxes in Detroit equate to about 3 mills as an equivalent tax. 19.46 mills in Detroit, 3.68 mills as State wide average. The grand total millage equivalent of taxes paid by taxpayers of Detroit is 84.83 mills as compared with 54.52 mills as a State wide average or 55 percent higher than the State wide average. This is what's commonly referred to as the municipal tax over burden, which I believe other witnesses have spoken to, that is felt by residents of Detroit. When you compare the total taxes to the level of school taxes, school tax is not unreasonably high. As a matter of fact, as I have indicated, it's less than the State wide average. But when you add to that local school tax, all other taxes, you come to a total cumulative level

that is greatly in excess of the State wide average and what tax burden is felt by other taxpayers throughout the State. This is what contributes to the difficulty of raising taxes in Detroit for schools by an additional levy because the ordinary taxpayer is certainly most concerned about his total tax bill, and not necessarily about the school portion as it relates to other portions of that tax.

. . .

[148] Q. And on the bottom of the chart, I see you have a memo and what is that memo? A. These are the total taxes excluding the school taxes, all city, village, township property and non property for Detroiters, 49.62 mills. Statewide average 15.92 or 211 percent higher. This relates to the non school taxes that are paid by residents of Detroit, as compared with the State wide average of the same types of facts.

. . .

[150] Q. Mr. Sutton, on the millage that is being paid for school taxes, comparing now 1974 to the—back through the history that we have, going back to 66. As compared to 1966, how many more mills are the citizens paying in Detroit? A. Using, say the November 1966 as the point of comparison, taxpayers today are paying 2 mills more in property taxes than they were paying in November of 1966. 12.5, the last column over there shows the resulting amount of voting millage. In November of 1966, with the passage of the 5 mills, voters were paying 12.5 mills at that time, of extra voted millage. In 1974, with the defeat, in August, of the additional 5 mills for 5 years, voters were paying . . .

. . .

[151] Q. Now, this—under present law, am I correct that the Detroit Board does not have power to levy an income tax? A. Under present law we do not have the power to levy income tax.

Q. And the power to levy income tax, back in '73, was the result of special legislation? A. That is right.

Q. And that was tied into the deficit? A. That's correct.

. . .

[157] Q. What is the percentage of the current budget from the State aid? A. In our current operating budget, about 47 percent comes from State aid. It's about 155 million dollars this year out of a total budget that would include our Federal programs and also our food service program, which is about 310 million dollars.

. . .

Q. Mr. Sutton, just to clarify it for the record and for the Court. What is the bonding capacity of the Board? A. The bonding capacity, by law, is 5 percent of our State equalized valuation without a vote of the people. So converted into dollars, let's just say the SEV, State Equalized Valuation, is approximately 6 billion dollars. 5 percent would be 300 million dollars. That's our total bonding capacity.

Q. And what, under State law, can that bonding capacity be used [158] for? A. That's used for capital construction purposes, new school construction and additions to school buildings, other ancillary facilities and modernization, and alterations.

Q. Can it be used for operating costs? A. No, it cannot. We are restricted from diverting bond proceeds or any funds in what we call our building and site fund, to general operating purposes.

Q. That's restricted by law? A. Yes.

. . .

(Cross Examination by Mr. Dziamba)

[162] A. No, the Library has been receiving the 64 hundredths of a mill allocated directly by the Wayne County Tax Allocation Board. What this does is provide for what is called a pass through of those funds to the Detroit Board. And we in turn, pay it over to the Library. The 64 hundredths of a mill is really part of the allocated millage that Detroit should have been receiving. That 64 hundredths of a mill, a number of years ago, was diverted from the school district and paid directly to the Library. This is just legalizing the arrangement and saying that that is legally due to the Library. However, since it is, and should be allocated to the Detroit Public Schools, we will do so, and the school district will pay it over to the Library.

. . .

WEDNESDAY, JUNE 4, 1975

(Vol. XXV)

CLEMENT SUTTON (continuing)

. . .

(Cross Examination by Mr. McCargar)

[Vol. XXV 28] THE COURT: You are four mills under the state average, aren't you?

THE WITNESS: Yes, that's the 28.14. But that 28.14 includes a couple of other items. The school portion of that 28.14 in 1973-'74 was 27.80 mills, just the school portion of that 28.14 mills.

THE COURT: And that 28.14 mills is—

THE WITNESS: Just the Detroit school district portion of the 28.14 was 27.80. There was another—

THE COURT: That's because you deduct this amount you are talking about, the .64?

THE WITNESS: Yes.

. . .

[38] Q. Under "Instruction" you show an increase of 28 million dollars between 1974-'75 and it's based on actual experience and your proposed budget. What does that figure represent? A. Well, it falls in two or three general categories, and I did not bring a detailed analysis with me that we have made of these entries of number one. I can just generalize on the number one. And the biggest part of all the increases [39] shown here in that column four relate to salary increases or at least some provision for contracted negotiations and salary increases. Also for payment of increments, salary increments. Also for certain improvements in services and—

. . .

A. As I said, I can't give you the detailed figures in terms of how much of that 28 is for each type of increase. But I'm saying to you generally that the increases fall into several categories, the biggest one being negotiated contracts and the salary increases that would be applicable. Number two is for wage increments that are paid to all employees. Number three is for requested improvements in services and restoration of instructional services at the region and central office levels.

. . .

Q. Is it fair to say that the most money has been budgeted for potential salary increases? [40] A. Since salaries represent 85% of our budget, I think it's fair to assume

that that would represent the largest single item in any increase, yes.

. . .

[41] Q. Under the figure of "Operations," you are proposing a seven million dollar increase. That also comes in terms of increased wages or increased personnel. A. No. The primary increase is in the operation area relating to the inflationary increases and increased cost of utilities particularly that we have experienced and anticipate experiencing in 1975-76.

. . .

[58] A. In large urban areas, the cost of services is higher. That does not mean that greater services are being provided. It means simply that the same service costs more money in Detroit than in other areas that are not of a similar urban nature.

. . .

(Redirect Examination by Mr. Roumell)

[80] Q. Could you tell this Court exactly the taxes that the Detroit Board is now certifying to be levied? A. Yes, I can. They are levying 8.01 mills as our allocation from the Wayne County Tax Allocation Board.

Q. That's what the Wayne County Tax Allocation Board levied? A. Right. As part of the 15 mill constitutional limitation.

Q. Okay. A. They are levying 14.5 mills in extra voted millage.

Q. And I'm referring to Chart 40. That's the last figure here, 14.5? A. That's correct.

Q. That's voted by the people? A. That's voted by the people.

Q. 8.01 is from the past allocation. Now, that gets us— A. To 22.51 mills. That represents our sort of a subtotal of the millage levy for operating purposes on local property. 22.51 mills.

Q. And the state average is 26.16. That has been testified to in this case. A. That's right. In addition to the 22.51 mills, there is a two and a quarter mill levy for retiring the operating deficit of the school district as authorized by legislation [81] in 1973, Public Acts 1 and 2.

Q. That gets us to 24.76. A. That's correct.

Q. The statewide average is operating at 26.15. So according to my math, the difference between 24.76 and 26.15 is 1.39 mills. A. Let me just further clarify that. I mentioned a moment ago that the two and a quarter mills does not produce any local revenue for operating expenses. That revenue is used solely for paying off that revenue deficit but cannot be used for operating expenses.

Q. But the citizens of Detroit are paying that now? A. Yes, sir.

Q. For that 68 million dollars we spoke of? A. That's right. Of course, there's another levy in addition to the 24.76 for bonded debt retirement purposes.

Q. What is that levy? A. That is 3.04 mills. I think that's a total of 27.80 altogether.

. . .

[88] Q. In Detroit, is it not correct that we have the largest

number of indigent students in Wayne County? A. Yes, very definitely. And very, as I indicated, do not use buses. We provide the bus tickets. And of course that increases our cost also in terms of total dollars.

• • •

FRIDAY, JUNE 6, 1975

(Vol. XXVII)

AUBREY V. McCUTCHEON, JR., having been duly sworn

• • •

(Direct Examination by Mr. Atkins)

[Vol. XXVII 71] THE WITNESS: • • • It is my opinion that acts of segregation are continuing; that you can't really classify them as past acts of segregation and talk in terms of reparations for past wrongs. It is almost like a continuing violation which is not corrected until something very definite and affirmative is done to correct it. And until such time as that is done, we can't refer to it as something in the past. It's something that through generations still exists. Now, what I'm saying is that there are schools in the city where black students will be in isolation and those black students are still the victims of segregations which is continuing because it has never been corrected. So, I'm talking about correcting current [72] violations in terms of the inequity of the educational opportunity provided to those children. This doesn't mean having X number of white or Latino or other pupils in those schools. I'm saying there are two violations that have to be corrected: one that can be corrected by Pupil Assignment, mixes and another that can only be corrected by taking care of the educational inequities that are provided to the children that attend those schools.

• • •

[86] A. • • • I thought you understood what I said earlier, that we're talking about all of the inequities being corrected in all the schools throughout the city because continuing segregation requires that we correct it. But I am suggesting there are two different ways: One you can do with pupil mix and other educational components. The other you are going to have to do simply by correcting the inequities by providing quality integration programs. But they are both remedies to the continuing violation of the constitutional mandate.

• • •

MONDAY, JUNE 9, 1975

(Vol. XXVIII)

AUBREY V. McCUTCHEON, JR. (continuing)

(Direct Examination by Mr. Atkins)

[Vol. XXVIII 62] A. First of all, we need in-service training generally in order to help improve the quality of education. I'm talking about for employees, not just teachers. But in addition, going into a desegregation plan I think we have to try to determine just what the actual activity of teachers is going to be designed to accomplish the goal of making the plan work and there has got to be some training of individuals who obviously—some people who will never—[63] who have never worked in a school where there was a large black population, some of the schools that we are desegregating under the pupil assignment mix have never had large numbers of blacks in the schools, certainly not had large numbers of blacks that have come from the areas in the city unlike the areas in which the teacher is currently teaching. And this relates to both black and white teachers. And we need to be able to train those people in the techniques which are designed to help implement a desegregation plan.

Q. Would it be correct to say, Mr. McCutcheon, that a plan that did not include in-service training would, in your opinion, be an incomplete plan? A. Yes.

. . .

A. . . . [66] I think that the proper testing procedures are even more important in a desegregation setting because it can so quickly lead to resegregation of students if not properly applied.

. . .

[76] THE COURT: Well, let us assume that the school is 95 percent black, and let us assume that the fourth grade in that school had its range and it was, say a student fell within the 8 percentile. Now, if I understand it that means that 92 percent of the students did better.

THE WITNESS: That is correct.

THE COURT: Pardon me?

THE WITNESS: That is correct.

THE COURT: Now, as for those students that fell within the 8 percentile, is there anyone who examines these testing results to determine whether or not as to those particular students, in addition to what might possibly be a lower achievement level, that there might be something wrong with the program in the school or the fourth grade as a whole as it affects those particular students?

THE WITNESS: That is what should be done, Your Honor. That is what most likely is not done in most of the schools in the city of Detroit.

. . .

[77] THE COURT: Now, does the Detroit Board of Education devise remedial programs on the basis of this, or are there no remedial programs developed from these testing results?

THE WITNESS: There are some remedial programs, not nearly enough, and again, most frequently the tests results are announced some several months after the tests have been given, and business goes on as usual. What I'm saying is that that should not happen anyway, and certainly under a desegregation plan, it should not be allowed to occur.

MR. ATKINS: Your Honor, may I call your attention to page 223 in the Board's plan where it addresses, to some extent, part of the questions being raised by the Court. Beginning with the first paragraph where it says, "Special education is a particularly damaging example of the use of tests to track children and the special educational classes for the emotionally, mentally retarded show a disproportionately large number of black students among those labelled as retarded by [78] clinical measures." And it goes on to give some data there. Then, if you will go down to the last sentence in the section says, "These statistics indicate that black children are being discriminated against in testing and placement procedures." And the next paragraph deals with placement. "Children in special education are unable to get out of a trap, once placed there because of the low frequency of re-test." So that once a child has been assigned to a remedial class as a result of tests, because as the witness has testified, there is such a low frequency of retesting, any additional errors made in that assignment, are not caught, or corrected. Similarly, I think this material suggests, as Your Honor was suggesting, the assumption is that if the student achieves poorly on the tests, it's the student's fault rather than there being any systematic way of re-examination of the testing process or the testing instrument to see if perhaps, one or the

other of those were at fault rather than the student. So Your Honor's questions are, in fact, partially answered in the materials supplied by the Board's component on testing. . . .

. . .

TUESDAY, JUNE 10, 1975

(Vol. XXIX)

ROBERT N. McKERR, having been duly sworn

. . .

(Direct Examination by Mr. McCargar)

[Vol. XXIX 153] Q. Will you describe the sources for school district funds in the State of Michigan? A. Yes. There are two primary sources and then a third minor source. The two basic sources are local property tax revenues raised by local Boards of Education levied and collected locally. A second major source is the State school aid which is distributed under the provisions of the State School Aid Act. A minor revenue source are federal funds.

. . .

[155] Q. Mr. McKerr, you mentioned the State School Aid. Will you tell me what the source of the State School Aid is? A. Yes. The State School Aid fund is a constitutional fund and it is comprised of 60 percent of the sales tax revenues, collected in the State of Michigan plus a small portion of the liquor excise tax and the cigarette tax. In addition, as long as I have been associated with the State Department of Education, it has been necessary for the legislature to authorize a general fund transfer because those revenues [156] from the earmarked sources have not been adequate enough to pay out of the State School Aid Act itself as enacted into law by the

legislature. So they have supplemented school aid from earmarked revenues from the general revenue fund of the State.

. . .

[168] THE COURT: Well, they received that as the computation of 92 percent of 75 percent of the amount.

THE WITNESS: That is correct.

THE COURT: There was some testimony here that the city of Detroit was restricted to that 92 percent of 75 percent, where as other school districts [169] were reimbursed 75 percent, the entire 75 percent.

THE WITNESS: The facts are that Detroit and a number of other city school districts were reimbursed at 92 percent of 75 percent, which is for what is called in-city transportation. The other school districts in the state did receive, under the State School Aid Act, reimbursement for the full 75 percent. This occurs because there are separate appropriations for in-city transportation and for what we in the Department call regular transportation, including all other transportation.

. . .

THURSDAY, JUNE 12, 1975

(Vol. XXX)

CHARLES PHILIP KEARNEY, having been duly sworn

. . .

(Direct Examination by Mr. McCargar)

[Vol. XXX 94] Q. By whom are you employed? A. By the Michigan Department of Education.

Q. In what capacity? A. I'm an Associate Superintendent for Research and School Administration.

Q. How long have you held this position? A. I have been with the department since July of 1968, approximately six and a half, going on seven years.

Q. And how long have you held the position of Associate Superintendent? A. I have been an Associate Superintendent with the department since July of 1968.

Q. And how long have you held the position of Associate Superintendent of Research and Administration? A. Since approximately spring of 1971.

. . .

[99] THE COURT: He has been offered as an expert in research and school administration.

MR. McCARGAR: Educational research and school administration. I will so offer him. • • •

THE COURT: I will accept him as such. Is there a need for voir dire now?

. . .

[115] Q. And is it fair to say that in-service training is done for educational purposes and not desegregation purposes. • • •

[116] THE WITNESS: No, I don't think so, Mr. McCargar.

. . .

THE WITNESS: Let me explain my answer. All school districts, all 530 K-12 districts plus the 60 some non K-12 districts hopefully do engage in in-service training activities for

all their professional staff. But I think in addition we have the experience of other school districts in the State of Michigan who are, or have undergone desegregation plans. And I'm quite certain that at least some components in their in-service training program are directly related to preparing the staff for that.

THE WITNESS: Yes, I would agree with that.

THE COURT: What else do you think [124] specifically, Dr. Kearney, ought to be in an in-service training program?

THE WITNESS: In terms of a desegregation effort?

THE COURT: Yes. I trust, of course, that the Detroit Board of Education as well as the Michigan State Board of Education are well familiar with in-service training programs that are designed to improve the teaching qualifications of a teacher or any para educational help. Specifically, in a desegregation program, what are some of the things you might suggest to in-service training to be added to what they are doing now, not subtracted from, but added to? • • •

. . .

THE WITNESS: I'm sure there are a number of things, I'm sure one would be interested in creating an awareness, if it wasn't there already, among teachers and professional staff about the cultural diversity [125] of this country, of this city, and of the fact that that different cultures certainly have heritages certainly ought to—the teacher, the professional ought to have an appreciation for those heritages and ought to be able to capitalize on kinds of differences, rather than look upon them as negative kinds of factors in dealing with children.

. . .

[126] Q. Now, let me call your attention next to the guidance and counselling aspects of the program, or the proposal. I think the State Board critique indicated that there should be some emphasis on guidance and counselling, is that correct? A. Yes, sir. Once again, the State Board and the Superintendent indicated that guidance and counselling appeared to deserve special emphasis in a desegregation effort. We also add that it certainly deserved emphasis in any school district in the State of Michigan.

. . .

[129] THE COURT: But you say in your critique, Dr. Kearney, a revamped guidance and counselling. And I am not sure that I understand precisely what implications you have for that word, revamped.

THE WITNESS: Let me attempt to explain what we were saying in the critique, Your Honor. We were saying in terms of the 13 components identified as quality educational components that first of all, in a general sense, our view, and from an educational point of view, eight of those 13 deserved special emphasis. We then went on to indicate that it was especially difficult for us as a third party, to make any judgments either about the adequacy of the true cost estimate that was being proposed in any one of those eight components. We support the notion of a guidance and counselling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis. Whether or not that ought to be elementary school counsellors in every elementary school building, very honestly, I'm not certain.

. . .

Q. Do you wish to continue. And when you say preparing the staff for that, preparing the staff in what respect? A. Well, I suspect when one undergoes a desegregation effort

that you have the movement of a number of pupils from different areas of the city or different areas of the school districts. And it seems good judgment to prepare teachers, as well as other professional staff who are going to meet these children when they come in the school, to be prepared and ready to work with those children and hopefully end up [117] with a successful experience.

. . .

Q. Now, have you had a chance to review the budget for in-service training that was submitted by the Detroit Board of Education? A. Yes, sir. And the preparation as part of my work or the critique that was prepared for this Court by the State Board of Education and the Superintendent of Public Instruction, I did indeed, review that component.

THE COURT: Did you write the critique?

THE WITNESS: I wrote portions of it, [118] Your Honor. Other portions were written by other people on our staff. I had the responsibility for the overall coordinating and preparation of the critique.

. . .

THE COURT: Now, I notice in this plan, as I pointed out the other day, that you list in-service training among the one that is of primary importance.

THE WITNESS: We identified eight of the 13 components as deserving special emphasis in a desegregating effort, and in-service training was one of those.

. . .

[123] THE COURT: Well, specifically, would you accept the fact that one of the topics that ought to be emphasized

in in-service training are topics that are designed to identify racism?

THE WITNESS: Yes, sir. I think under a desegregation effort, I would put primary emphasis on that kind of an aspect as well as any other aspect which would promote a successful desegregation program in terms of the interactions and sensitivity and empathy that teachers and other non professionals in the school system ought to have if the program is going to be reasonably, or have a reasonable chance for success.

THE COURT: All right. And of course, that ought to also include the various psychological considerations for teachers moving into a desegregated program?

THE WITNESS: Yes, sir.

THE COURT: In other words, it ought to make a teacher aware that that you are not teaching black students, or white Americans, you are teaching just plain students?

[138] Q. And with reference to the curriculum design component, would you require special emphasis? A. We identified that as one of the eight components that ought to be given special emphasis in fashioning a desegregation plan and carrying one out. The curriculum design, of course, is the heart, hopefully of what goes on in a school and we felt that wasn't a single or exclusive component, but was a component that tied in very closely with in-service training, tied in very closely with many of the other components. And we saw it deserving special emphasis. We see it deserving emphasis in any school district in the state to take a continual look at what it is doing in terms of the programs they are offering to young people and the way they might improve that.

• • •

[140] Q. And will you tell me why you thought curriculum design deserved special emphasis in the desegregation setting?

A. As I indicated previously, we felt that curriculum is the heart and soul of what goes on in a school and that attention ought to be paid to the programs that are put together, the programs that are being offered to the children involved in the desegregation effort. And the primary purpose of the children being in school is to receive an education. And the curriculum is the vehicle which provides that.

Q. And I'm still trying to tie in, if I may, why this is some [141] different in a segregated situation as opposed to one that is not. A. Well, it may not be different. What we're suggesting here once again, is this is an area that all school districts in the state of Michigan, all schools ought to pay close attention to continually. We felt that in a desegregation effort, however, it was an area that always deserved some special emphasis because, to the extent that the desegregation effort would prove successful, we felt that it would be enhanced if improvements needed to be made in the curriculum. They may not need to be made if they didn't see fit. It was incumbent that that curriculum be prepared, and if possible, improved.

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(Cross Examination by Mr. Dziamba)

[177] Q. The phrase used in the critique with respect to the educational component is "deserving of special emphasis."

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[178] Q. The phrase that I'm referring to appears, for example on page 39, among other pages and it states, "deserves special emphasis in connection with the implementation of a desegregation plan." A. Right.

Q. Whatever went on in a general sense in the educational system, they deserved special emphasis whether with respect [179] to the implementation of a desegregation plan, is that correct? A. We were saying in affect, two things. All thirteen deserve attention in any educational program in the state, in any district. These eight in particular, deserved some special emphasis in implementing a desegregation plan.

Q. Is it your opinion as an educator that the eight are required in the effective implementation of the plan, not from a local point of view, from an educational point of view. A. From my point of view, I guess I would answer that out of those eight, some of them—for example, in-service training, in my mind certainly would be required. Some of the other components I'm not sure would be required in an absolute sense. Once again, I think certainly would deserve some emphasis and review, and undoubtedly might enhance the possible success of a desegregation plan.

Q. Can you look on the list on page 36. In reviewing those, what other ones, in your opinion, would you say are required for implementation of a desegregation plan? A. In terms of my own personal opinion, the first one would be in-service education. The next one, while I have some reservations about that in terms of what the Detroit Board's plan involves, I do think probably would be required, and that's [180] in the area of student rights and responsibilities. I would feel fairly strongly, I think, personally about six and seven in terms of involving the community and parents in that effort. And as I indicated earlier, I think I would certainly think that real attention ought to be paid to setting up, if they're not already there, good curriculum programs. And I think that that's also really speaks in part of twelve and thirteen.

Q. All right. In your opinion, in the curriculum design

program, is that—would that include a reading component?

A. If I were interested in setting up an adequate curriculum, it certainly would.

. . .

[184] Q. I understand. But the use of testing may have discriminatory affects. Do you agree with that? A. Yes, I think there's ample evidence there, probably more so in the area of special education than in terms of what you might call general education.

Q. And in light of that opinion, would that not have a direct relationship to desegregation? A. In my opinion, at that time, and I think at the present time, it did not have a direct relationship to the plan as being proposed by the Detroit Board of Education.

Q. Would you see a direct relationship without regard to the specific narrative of the Board; do you see a direct relationship between testing and desegregation? A. If test results were inappropriately used to categorize children into special education programs and most of those children happen to be black as a result of that kind of use, yes I think it would have certainly a discriminatory affect and it would have a negative affect, I'm sure on any kind of desegregation plan being implemented.

Q. And the statement would be true with respect to aptitude and achievement testing if those results were being used in a discriminatory manner, isn't that correct? [185] A. If they were being used in a discriminatory manner, I would think so.

. . .

[186] Q. Okay. With respect to in-service education, you agree, I believe in response to the Judge's question, that it

should put primary emphasis on racism identification. Do you recall that? A. I think I said that certainly that should be included in that component. If I recall my testimony correctly, I was saying that we thought in-service training deserved special emphasis, particularly in the area of preparing professional and non professional staff for a desegregation program which would include the identification of racism which would include the recognition of different contributions of cultural groups in society, and so forth.

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[187] Q. Would the racism identification be valuable in terms of in-service education for those teachers? A. Yes, it would. But once again it would in light of my previous comments that it would be valuable for all teachers in this school district, or all teachers in any school district in the state of Michigan.

Q. With respect to a desegregation plan, what is your opinion? A. That it's highly desirable and probably required for those schools that are going to be involved in the actual pupil assignment plan. And I guess desirable for the remainder of the schools, and make a differentiation, I think.

Q. In your opinion, would—strike that. Well, we'll go on to another one. With respect to guidance and counselling, you stated that it did have a relationship to a desegregation effort. Can you briefly tell me what that relationship is?

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THE WITNESS: In the critique, as [188] you are aware, we indicated the State Board and Superintendent indicated that that was an area that deserved special emphasis. My earlier testimony, in response to his Honor's question, from a personal point of view, from—in the area of guidance and

counselling, I would put much more if not exclusive emphasis on the secondary level from the grades 7 through 12.

Q. I think—do you feel that without adequate guidance and counselling, there's a tendency to stereotype students of particular jobs or vocations, based on race, for example?

A. I certainly think that's been done in the past. But I think it's also been done or one of the fine cases where guidance counsellors themselves have been involved in that kind of activity.

Q. Yes. I—so that the guidance and counselling would, with relation to a desegregation plan, would try to guard against that, or at least to train those counsellors to be aware of that particular tendency, is that one of the aspects of it? A. I suppose so.

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[191] Q. All right. So, that the dollar with respect to guidance and counselling, of course we're talking in terms of a desegregation plan and its relatedness to desegregation although you wouldn't spend that dollar below grade 7, you think that some of the same kinds of functions should be taken care of by other components, for example in-service component? A. Yes. Some of the functions that I identified, and you identified.

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Q. With respect to curriculum design, can you briefly indicate why you believe that that is deserving of special emphasis in a desegregation program, what would it accomplish with respect to implementation of the plan? A. As I indicated earlier, the curriculum design or the curriculum is the primary vehicle by which educational [192] services are provided to children. And to enhance the success of any kind of an effort, and in this instance a desegregation effort, I would feel, and

the critique also states that review, improvement is necessary of the curriculum or curricula ought to be taken if they haven't been already.

Q. I understand in a—given particular connection with respect to implementation of a desegregation plan. A. We felt from an educational point of view that—and looked at what was going on in terms of the program being offered and the possible improvement of those programs would simply be a positive note and enhance the likely, or the possibility of success for the pupil reassignment plan. You put the children into school rooms and in the schools for a purpose. The primary purpose, I think, is to provide them with an education. The curriculum is supposedly the primary vehicle for that.

Q. Do you view it as a means of repairing damage done by segregation, for example? A. I suppose you could certainly. I think you're attempting to address a number of things with the curriculum. You're attempting to address problems that a child might have in achievement which may or may not in part, be due to a segregated situation.

[193] Q. Is that your opinion. A. Yes.

• • •

(Cross Examination by Mr. Roumell)

[207] THE COURT: • • • the father who would never be able to get there in the afternoon?

MR. SACHS: As a matter of fact, Your Honor, I understand it does work and beyond these regularly prescribed times, parents visits to the classroom are expressly encouraged.

THE COURT: Pardon me?

MR. SACHS: In addition to prescribed general meeting time of parent teacher conferences, parent visits are encouraged without waiting for any periodic • • •

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[208] Q. My question is you testified—we're talking about all the components you refer to that should have deserved special emphasis. You were talking about those components contributing to the success of a desegregation plan. A. Yes, sir. We said they deserve special emphasis in implementing a desegregation plan.

Q. And the answer is yes to my question? A. Yes, sir.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY and
RICHARD BRADLEY, et al.,
Plaintiffs,

v

WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants,

DETROIT FEDERATION OF
TEACHERS, LOCAL 231, et al.,
Intervening Defendants.

No. 35257

EXCERPTS FROM TRANSCRIPT OF
PROCEEDINGS—VIOLATION HEARINGS

TUESDAY, APRIL 27, 1971

(Book 8)

ROBERT GREEN, having been duly sworn

• • •

(Direct Examination by Mr. Lucas)

[874] THE COURT: Well, this is the reverse of the previous objection you made, as I recall.

MR. BUSHNELL: Yes. I might try it another way before the morning is over.

THE COURT: I will be consistent; I will rule against you. You may answer that. I hope you understand the question. Are you asking this witness whether as a result of the information which is depicted in these graphs he is able to project backwards?

MR. LUCAS: Yes, back to the entry level of the child when he started at the first grade.

THE COURT: Meaning kindergarten.

MR. LUCAS: Ordinarily we have Metropolitan Readiness Tests given in pre-school and first grade. We don't have that data available.

MR. BUSHNELL: I do object unless a foundation is laid as to how Dr. Green can project back.

THE COURT: I do overrule you. You may inquire later the basis for the doctor's answer, if he has one.

A. There are two ways to approach the question. There is a major national body of data from men such as Otto Klineberg, Dr. Havighurst at the University of Chicago and Kenneth Clark in New York and many others which support the point of, very very [875] strongly, that there tends to be little discrepancy between black and white youngsters at the point of entry into the public school system, namely, at the first grade level. The discrepancy begins to appear once the youngster is involved in an educational program it becomes increased over time. Sometimes it is referred to as a systematic decline in achievement over time on the part of blacks and an increase in achievement over time on the part of white youngsters. So what we find is very little difference at the point of entry and the discrepancy comes over time as the youngster moves through the academic program. So what we

have is something like this. A departure in gains for over time. We don't have, first, second or third grade data here, but we have fourth, sixth and eighth grade data and we will find that as the youngster moves, as depicted here, across grade levels over time there is an increase in the discrepancy between the academic achievement of black and white youth.

Q. When you say "here," where do you mean? A. The Detroit data, the mean grade equivalent of reading.

Q. What exhibit number? A. This is exhibit 134-A. One could infer that the Detroit data probably approximates a national body of educational achievement data.

MR. BUSHNELL: Excuse me. I will object [876] to any inference.

MR. LUCAS: Your Honor, I think an expert is qualified to give an opinion.

THE COURT: Yes, that is what I understand he is on for. He may state his conclusions, unlike other witnesses.

A. One can infer, or perhaps I should say it is my opinion that one can infer that there was probably very little discrepancy at the point of entry of grade 1, or if there was a discrepancy it was minimal, but the discrepancy by the eighth grade is very dramatic and tends to increase over time. This data here approximates the kind of data that can be nationally referred to in terms of the discrepancy between black and white achievement and segregated schools over time.

Q. Dr. Green, is there any particular added importance with respect to reading tests as opposed to comprehensive tests? A. Not necessarily so. Again we can even go to the graduate level, moving apart from the public school system and we tend to find that black students who apply to graduate

schools who attended segregated black schools tend to not perform as well academically on such achievement or aptitude tests, in contrast to white students who at that time attend multi-racial schools, schools who are integrated.

. . .

(Cross Examination by Mr. Bushnell)

[1008] between black and white students as you find here between all black and white schools. One recent example was mentioned in yesterday's *Detroit News* from the Berkeley, California system. As schools are made more multi-racial, the kind of discrepancy that we find that exists here in terms of measuring academic achievement tends to become minimal. The gap closes, in other words.

Q. Before I ask you to return to the stand, I would ask you to explain to me why the Barton, a predominantly white school, is below city-wide average; why the Bennett, a 90 percent or more white school, is at the city average; why the Clifford, a predominantly white school, is even below the Barton at about 4.7; why the Logan, a predominantly white school, is below the city average; why the Maybury, a predominantly white school, and the Meinas, also a predominantly white school, are both below the city average? A. Well, there may be a combination of factors. Again I would like to refer to a pattern of achievement rather than achievement of a few selected schools. When you look at the pattern of achievement of white versus black schools, white schools far exceed said black schools in terms of academic achievement. You talk about selected white schools that are below the mean—I do not know where or how the Meinas or the Maybury, which is predominantly white is structured in terms of income. But, [1009] I would guess that it is a low-income white area.

Q. Yes, it is. A. I would guess that if you mix the

Maybury kids up with the McColl, which is predominantly white and way above the national mean, if you mix those very poor white kids with the very well-to-do white kids, you will ultimately see a change in their academic achievement, also.

Q. By the same token, if you mix low-achieving poor black kids with higher achieving rich white kids, you are going to have the same result, aren't you? A. Yes.

Q. Now, let me ask you what if you mix low-income whites with low-income blacks, both below achievers? A. Some of the data out of California found that then you mix low-income whites with low-income blacks and both are low achieving that you do not find the change in academic achievement when you overcome both race and social class. I think this is clearly pointed out here in the *School Finance and Educational Opportunity Study in Michigan*, in which it states here on page 62 that social class or racial complexion as being the most important factor to influence educational output would be incorrect. Rather it can be said that both variables point to areas which need attention and remedy if educational opportunity in Michigan is to be made truly equal.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al.,		No. 35257
Plaintiffs,		
v		
WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,		
Defendants.		

DESIGNATED EXHIBITS FROM REMEDY HEARINGS

COMPARISON OF ABILITY TO TAX, PER PUPIL EXPENDITURES, AND EDUCATIONAL IMPACT
FOR DETROIT, OTHER MICHIGAN DISTRICTS OVER 25,000 PUPILS, AND
WAYNE, OAKLAND, AND MACOMB COUNTY DISTRICTS OVER 4,500 PUPILS FOR 1973-74

Office of Research, Planning, and Evaluation
Detroit Public Schools
March 1975

Defendants' Exhibit 30a

FOREWORD

Detroit children continue to be deprived of an equitable opportunity for quality education. When compared to other school districts in Southeastern Michigan, the Detroit schools do not even receive equal dollars per pupil and certainly not the extra dollars per pupil that are needed in urban centers in order to provide equity. This report has been prepared in order to better inform citizens, educators, legislators and others interested in quality education in Detroit and Michigan.

The attached charts compare Detroit with Michigan school districts having 25,000 pupils and with Wayne, Oakland and Macomb county districts having 4,500 or more pupils, for the school year 1973-74. Comparisons are presented for factors relating to (a) ability to tax, (b) per pupil expenditures, and (c) educational impact.

The first column in each chart shows that, even though Detroit residents pay 20-30 mills more in total municipal taxes than most other districts, the Detroit schools have fewer mills for school operation than those districts. The primary consequence of this situation is that Detroit is at the low end of the range in per pupil expenditures even when compensatory education funds are included. When those special funds are removed from the comparison, the contrast is sharpened dramatically.

The lower per pupil expenditures result in a substantially smaller number of professional staff per 1,000 pupils and are a partial cause of the high dropout percentage and the low achievement level as shown in the last few columns.

Detroit parents rightfully believe that their children are as important as any children in the highest achieving districts in the metropolitan area. The first chart compares Detroit with those districts. The second, third and fourth charts given figures for Wayne, Oakland and Macomb counties. The fifth chart compares Detroit with Flint, Grand Rapids, Lansing and medians and ranges for Wayne, Oakland and Macomb counties.

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	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62
	Equiv. Mill- age Income & Util. Tax	Total Munic. Equiv.	School Operating Millage	School Debt Millage	Enrollment	SEV/Pupil	Average Teacher Salary	Total Expense/ Pupil	State Compens. Inc/Pupil	Fed. Compens. Inc/Pupil	Total, Less Compens.	Inc/Pupil	Teachers. Per 1000/Pupil	Prof. Staff Per 1000/Pup	Dropout Percentage	Achiev. Pup. Scale Rank																																														
Allen Park	0	52.86	31.65	1.10	5,386	22,996	17,291	1,175	0	12	1,163	39	49	49	3	62																																														
Cherry Hill	0	56.72	25.65	7.00	4,508	13,525	13,682	976	0	24	952	40	46	46	11	47																																														
Crestwood	0	54.89	30.15	5.50	5,091	19,626	12,106	1,032	0	8	1,024	42	43	43	3	54																																														
Dearborn	0	56.02	27.40	2.62	19,341	55,483	15,087	1,713	0	23	1,690	45	56	56	3	60																																														
Dearborn Heights	0	55.14	27.65	8.25	5,005	11,584	13,503	968	0	18	950	46	45	45	5	49																																														
Garden City	0	62.35	29.00	7.00	12,228	11,662	13,699	1,045	0	13	1,032	41	40	40	7	44																																														
Grosse Pointe	0	56.46	31.41	2.51	11,752	39,993	17,173	1,397	0	8	1,389	43	50	50	2	44																																														
Highland Park	8.81	82.83	36.90	5.35	7,606	24,558	14,110	1,602	48	225	1,329	54	49	49	9	29																																														
Inkster	0	60.21	25.65	7.24	4,542	10,061	12,802	1,211	44	158	1,009	42	49	49	8	24																																														
Lincoln Park	0	49.57	23.65	2.75	9,489	19,819	13,145	975	0	14	961	38	44	44	8	44																																														
Livonia	0	54.37	28.90	5.26	35,890	24,914	15,016	1,119	0	8	1,111	41	47	47	3	60																																														
Melvindale	0	49.41	26.15	1.75	4,729	32,300	14,790	1,148	0	12	1,136	43	48	48	9	51																																														
Plymouth	0	49.66	28.55	5.77	11,852	29,256	14,036	1,154	0	22	1,132	41	47	47	5	58																																														
Redford Union	0	53.65	35.65	4.00	8,304	17,375	15,210	1,226	0	26	1,200	47	52	52	5	58																																														
Romulus	0	53.85	27.65	6.55	6,559	28,171	11,789	1,178	29	30	1,119	45	51	51	8	40																																														
South Redford	0	45.98	29.65	2.33	6,242	44,160	15,170	1,327	0	16	1,311	46	55	55	3	56																																														
Southgate	0	54.34	28.65	7.00	8,604	19,641	15,516	1,117	0	25	1,092	41	46	46	6	52																																														
Taylor	0	57.80	31.53	4.70	21,983	18,421	15,191	1,155	0	21	1,134	41	47	47	6	42																																														
Trenton	0	50.15	26.65	4.90	6,916	33,741	15,157	1,101	0	10	1,091	42	49	49	6	61																																														
Van Buren	0	40.77	23.65	2.23	8,171	27,817	12,925	1,114	20	33	1,061	44	49	49	16	37																																														
Wayne Westland	0	66.27	37.65	7.00	23,655	16,584	14,263	1,215	23	29	1,163	42	50	50	5	44																																														
Wyandotte	0	53.27	25.15	5.34	7,494	27,300	14,354	1,093	0	68	1,025	40	47	47	8	47																																														

COMPARISON OF ABILITY TO TAX, PER PUPIL EXPENDITURES, AND EDUCATIONAL IMPACT
FOR WAYNE COUNTY SCHOOL DISTRICTS OVER 4500 PUPILS, EXCEPT DETROIT
(DATA ARE FOR 1973-74 EXCEPT THAT '72-'73 ARE LATEST AVAILABLE DATA FOR LAST TWO COLUMNS)

COMPARISON OF ABILITY TO TAX, PER PUPIL EXPENDITURES, AND EDUCATIONAL IMPACT
FOR DETROIT AND THE TOP AND BOTTOM SCHOOL DISTRICTS IN WAYNE, OAKLAND AND MACOMB COUNTIES
(DATA ARE FOR 1973-74 EXCEPT THAT '72-'73 ARE LATEST AVAILABLE DATA FOR LAST TWO COLUMNS)

-106-

|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
	Equiv. Mill- age Income	Util. Tax	Total Munic. Millage	School Operating Millage	School Debt Millage	Enrollment	SEV/Pupil	Average Teacher Salary	Total Expense/ Pupil	State Compens Inc/Pupil	Fed. Compens Inc/Pupil	Total, Less Compens. Inc/Pupil	Tchrs. Per 1000/Pupil	Prof. Staff Per 1000/Pup.	Dropout Percentage	Achieve. Pup. State Rank				
Berkley	0	0	63.69	34.53	1.28	7,026	19,226	13,725	1,230	0	25	1,205	48	57	1	59				
Birmingham	0	0	55.85	32.03	3.80	14,644	34,706	17,206	1,352	0	5	1,347	44	57	1	65				
Bloomfield Hills	0	0	58.85	31.53	6.50	9,925	35,562	15,215	1,500	0	5	1,495	44	57	1	65				
Clarkston	0	0	54.85	21.21	7.00	7,099	15,396	12,119	973	0	27	946	44	57	1	54				
Farmington	0	0	53.34	31.53	6.00	15,853	23,824	12,942	1,269	7	21	1,241	44	57	1	61				
Harbortown	0	0	62.21	30.53	2.00	7,319	21,254	14,076	1,440	0	23	1,217	48	57	1	53				
Hazel Park	0	0	60.32	27.53	6.34	7,931	16,447	13,279	1,136	0	37	1,069	49	57	1	53				
Irish Valley	0	0	46.61	27.93	7.30	9,243	17,558	12,076	1,087	0	17	1,070	38	57	1	44				
Like Orion	0	0	61.04	24.39	10.19	6,039	15,168	11,061	1,074	0	16	1,058	43	57	1	47				
Lafayette	0	0	62.80	32.53	7.23	5,251	30,846	14,574	1,278	0	14	1,264	43	57	1	53				
Oak Park	0	0	61.21	31.53	5.27	4,505	52,284	15,651	1,944	0	47	1,897	56	57	1	57				
Fontaine	8.08	0	64.91	24.53	4.00	22,109	29,358	14,601	1,360	0	9	1,320	38	57	1	57				
Rochester	0	0	47.26	26.93	7.00	9,888	23,629	13,150	1,108	0	9	1,099	39	57	1	60				
Royal Oak	0	0	53.93	27.78	1.58	16,024	24,218	14,856	1,316	0	60	1,256	46	57	1	52				
Southfield	0	0	49.54	27.53	3.25	14,764	42,587	13,507	1,374	0	13	1,361	58	57	1	64				
Troy	0	0	59.35	28.33	7.20	8,210	37,615	13,257	1,260	0	22	1,238	43	57	1	58				
Walled Lake	0	0	49.51	28.11	5.00	11,348	21,097	13,373	1,248	0	73	1,175	46	57	1	42				
Waterford	0	0	51.00	30.53	7.00	17,975	16,133	12,756	1,112	0	35	1,077	36	57	1	47				
West Bloomfield	0	0	53.71	30.13	7.30	5,776	22,882	12,650	1,151	0	12	1,139	44	57	1	61				

COMPARISON OF ABILITY TO PAY, PER PUPIL EXPENDITURES, AND EDUCATIONAL IMPACT
FOR OKLAND COUNTY SCHOOLS, DISTRICTS OVER 4500 PUPILS
(DATA ARE FOR 1973-74 EXCEPT THAT '72-'73 ARE LATEST AVAILABLE DATA FOR LAST TWO COLUMNS)

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
	Equiv. Mill- age Income	Util. Tax	Total Munic. Millage	School Operating Millage	School Debt Millage	Enrollment	SEV/Pupil	Average Teacher Salary	Total Expense/ Pupil	State Compens Inc/Pupil	Fed. Compens Inc/Pupil	Total, Less Compens. Inc/Pupil	Tchrs. Per 1000/Pupil	Prof. Staff Per 1000/Pup.	Dropout Percentage	Achieve. Pup. State Rank				
Centerline	0	0	51.89	26.88	3.12	6,106	31,084	12,814	1,135	0	41	1,094	40	57	1	55				
Clintonville	0	0	55.89	33.58	7.00	5,585	10,620	13,235	1,119	0	46	1,073	41	57	1	47				
East Detroit	0	0	61.19	32.58	4.42	12,047	15,424	14,360	1,133	0	35	1,098	44	57	1	54				
Fitzgerald	0	0	52.83	27.58	2.21	5,334	37,103	14,986	1,314	0	28	1,286	46	57	1	54				
Fraser	0	0	58.11	30.10	7.60	8,232	16,841	14,552	1,026	0	18	1,001	33	57	1	51				
Lake Shore	0	0	60.91	28.58	7.00	9,582	10,402	14,229	993	0	10	983	37	57	1	53				
Lakeview	0	0	61.91	31.58	7.00	7,141	14,129	13,444	1,117	0	17	1,100	39	57	1	51				
L'Ange Creuse	0	0	50.88	30.02	7.70	8,422	18,505	12,617	1,117	0	49	1,068	42	57	1	51				
Mt. Clemens	0	0	61.87	32.08	4.76	6,151	19,055	13,974	1,276	0	18	1,158	46	57	1	40				
Romco	0	0	65.22	26.58	7.26	4,910	17,122	12,203	1,037	9	14	1,014	40	57	1	53				
Roseville	0	0	56.68	25.58	7.00	13,201	16,103	14,246	1,054	0	46	1,009	38	57	1	44				
South Lake	0	0	57.41	28.06	4.00	5,257	25,403	14,128	1,225	0	18	1,207	41	57	1	55				
Utica	0	0	52.47	26.24	7.42	25,713	18,396	13,032	1,032	0	23	1,009	41	57	1	58				
Van Dyke	0	0	62.44	31.58	7.83	6,656	26,446	14,959	1,032	0	30	1,292	48	57	1	47				
Warren Consolidated	0	0	55.16	26.58	7.00	34,080	21,902	12,306	1,084	0	21	1,063	41	57	1	58				
Warren Woods	0	0	55.61	25.58	7.00	9,223	12,725	13,206	1,005	0	11	994	44	57	1	58				

COMPARISON OF ABILITY TO PAY, PER PUPIL EXPENDITURES AND EDUCATIONAL IMPACT
FOR MACOMB COUNTY SCHOOL DISTRICTS OVER 4500 PUPILS
(DATA ARE FOR 1973-74 EXCEPT THAT '72-'73 ARE LATEST AVAILABLE DATA FOR LAST TWO COLUMNS)

Column 11	1973-74 total expense per pupil less both state and federal compensatory education income per pupil. (Note that some virtually insignificant problems could result from subtracting income from expenditures.) Source: Michigan Department of Education.
Column 12	1973-74 number of teachers per 1000 pupils. Source: Metropolitan Detroit Bureau of School Studies reports.
Column 13	1973-74 number of professional staff per 1000 pupils. Source: Metropolitan Detroit Bureau of School Studies reports.
Column 14	1972-73 percentage of student dropouts. Source: Michigan Department of Education.
Column 15	1972-73 average pupil percentile rank among all state pupils on grade seven composite achievement test score from Michigan Educational Assessment Program report.

DESCRIPTIONS AND SOURCES OF DATA (Continued)

DEFENDANTS' Exhibit 31

COMPARISON BETWEEN THE DETROIT CITY TAX RATE
AND THE AVERAGE IN THE OTHER 20 LARGE CITIES IN MICHIGAN

	<u>Equivalent Mills</u>
--Lower per capita state equalized valuation	10.09
--Lower per capita yield from city income tax	5.30
--Services in Detroit not provided by most other cities	
--Health	2.45
--Hospital	1.86
--Art Institute, Zoo, Historical Museum, Civic Center, public transit, Recorder's Court	3.10
--Detroit per capita expenditure for police in excess of 20-city average	9.50
--Detroit per capita expenditure for sanitation in excess of 20-city average	3.10
Total Mills Above Items	35.31

Defendants' Exhibit 22

City Property Tax Rates, Millage Equivalent of City Income Tax
& Utility Users Excise Tax & State Equalized Value Per Capita
in Detroit and 20 Michigan Cities Over 50,000 Population, 1973-74

City	City Property Tax Rate	Equivalent Millage Income Tax ¹	Utility Tax	Total City Rate	State Equalized Value Per Capita ²
Ann Arbor	18.25			18.25	\$ 5,661
Dearborn	20.21			20.21	9,868
Dearborn Heights	11.83			11.83	4,157
Flint	8.55	8.49		17.04	6,131
Grand Rapids	10.66	7.48		18.14	4,274
Kalamazoo	18.61			18.61	4,582
Lansing	10.77	8.24		19.01	5,359
Lincoln Park	15.76			15.76	3,549
Livonia	11.28			11.28	7,737
Pontiac	19.48	8.08		27.56	6,594
Roseville	15.89			15.89	3,813
Royal Oak	15.75			15.75	4,223
Saginaw	10.70	7.55		18.33	5,510
St. Clair Shores	17.12			17.12	3,539
Southfield	9.94			9.94	10,190
Sterling Heights	10.43			10.43	8,493
Taylor	14.04			14.04	4,953
Warren	14.82			14.82	6,271
Westland	13.03			13.03	3,957
Wyoming	10.55			10.55	5,709
20-City Average (Mean)	13.53	2.66		16.19	5,745
DETROIT	30.16	16.16	3.25	49.57	3,840

¹ Includes income taxes on resident individuals and corporations, excludes estimated non-resident collections.

² 1973 state equalized valuation divided by 1970 population.

Per Capita Amounts of Selected City Functions, Items,
Detroit and All U.S. Cities by Population Size Groups
1972-73

Defendants' Exhibit
33

	All U.S. Cities by Population Size							
	1,000,000 or more	500,000 to 999,999	300,000 to 499,999	200,000 to 299,999	100,000 to 199,999	50,000 to 99,999	Less than 50,000	All U.S. Cities
General Expenditure- All Functions	\$357	\$681	\$427	\$328	\$325	\$280	\$229	\$158
General Expenditures: Common Functions	222	228	200	174	176	153	135	112
Variable Functions	134	453	227	154	147	124	93	46
Common								
Highways	14	20	26	21	25	23	22	22
Police	66	63	48	34	33	30	26	23
Fire	23	26	25	24	24	23	20	11
Sewerage	43	21	19	25	19	16	15	17
Sanitation	20	20	14	11	16	11	9	8
Parks & Rec.	17	13	22	20	20	17	14	8
Libraries	5	6	5	4	5	4	4	2
Financial								
Ad.	8	6	7	5	6	5	5	4
Gen. Control	8	13	12	6	8	7	7	7
Public Bldgs.	2	8	6	6	5	5	4	3
Interest	16	32	16	18	15	12	9	7
Variable								
Education	6	128	56	61	57	53	39	15
Welfare	3	135	44	7	9	6	3	1
Hospitals	20	56	27	8	8	7	7	7
Health	12	18	12	5	4	3	2	1
Housing & Urban Renewal	30	36	17	15	21	15	11	3
All Other	63	80	71	58	48	40	31	19

Detail may not add to total due to rounding.

Source: U.S. Bureau of the Census, "City Government Finances in 1972-73," Tables 4 and 5.

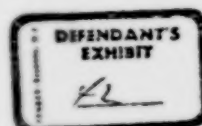
OFFICE OF FEDERAL STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS

	1974-1975 APPROVED FUNDS	1975-1976 PROJECTED FUNDS
<u>ELEMENTARY AND SECONDARY EDUCATION ACT</u>		
<u>TITLE I (A)</u>	19,897,250	19,285,110
(B)	925,444	1,000,000
Carry Over	1,800,611 (Ex.)	3,000,000
<u>TITLE I SUB TOTAL</u>	<u>21,714,235</u>	<u>23,285,610</u>
<u>TITLE II</u>		
LIBRARY RESOURCES	831,451	850,000
<u>TITLE II SUB TOTAL</u>	<u>831,451</u>	<u>850,000</u>
<u>TITLE III</u>		
INNOVATIVE AND EXEMPLARY PROGRAMS		
Fine Arts and Communication Skills Program	202,794	202,794
INNOVATIVE AND COMPREHENSIVE PROGRAM FOR BILINGUAL STUDENTS	221,323	150,000
REGIONAL INTERDISCIPLINARY SERVICES TEAM PROJECT	176,574	83,000
SECTION 303(a)		
Guidance and Counseling	69,256	70,000
<u>TITLE III SUB TOTAL</u>	<u>671,947</u>	<u>475,794</u>



OFFICE OF FEDERAL STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS

	1974-1975 APPROVED FUNDS	1975-1976 PROJECTED FUNDS
<u>TITLE IV (A)</u>		
INDIAN ELEMENTARY AND SECONDARY SCHOOL ASSISTANCE ACT	29,783	72,803
<u>TITLE IV SUB TOTAL</u>	<u>29,783</u>	<u>72,803</u>
<u>TITLE VI</u>		
PART B: OBSERVATIONAL - PRESCRIPTIVE CENTER FOR SEVERELY HANDICAPPED	271,455	279,350
PART C: TECHNICAL ASSISTANCE/RESOURCE/ TRAINING CENTER	130,231	83,400
SPECIAL STUDY INSTITUTE	10,152	
<u>TITLE VI SUB TOTAL</u>	<u>411,838</u>	<u>362,750</u>
<u>TITLE VII</u>		
BILINGUAL EDUCATION	300,604	350,000
<u>TITLE VII SUB TOTAL</u>	<u>300,604</u>	<u>350,000</u>
<u>TITLE VIII</u>		
DROPOUT PREVENTION	622,700	Funding Terminated
<u>TITLE VIII SUB TOTAL</u>	<u>622,700</u>	
<u>TITLE IX</u>		
SOUTHEASTERN MICHIGAN REGIONAL ETHNIC HERITAGE STUDY CENTER	4,000	
<u>TITLE IX SUB TOTAL</u>	<u>4,000</u>	
<u>ELEMENTARY AND SECONDARY EDUCATION ACT SUB TOTAL</u>	<u>24,505,751</u>	<u>25,633,754</u>

OFFICE OF FEDERAL, STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS

	<u>APPROVED FUNDS</u>	<u>PROJECTED FUNDS</u>
<u>STATE AID ACT</u>		
CHAPTER 3	11,262,733	12,000,000
SECTION 41, CHAPTER 4 ACT 529 OF 1972		
Audio-Visual Instruction Systems Project	15,673	Funding Terminated
SECTION 45		
A Program for Academically Talented & Gifted Students		50,000
SECTION 12	809,503	700,000
STATE AID SUB TOTAL	12,085,909	12,750,000
<u>DEPARTMENT OF LABOR</u>		
<u>COMPREHENSIVE EMPLOYMENT TRAINING ACT (CETA)</u>		
134 <i>made</i> Title I (Licensed Practical Nurses)	212,183	215,000
Title I (Disadvantaged Youth Program)	2,073,500	2,500,000
Title II	2,589,150	3,000,000
Title VI (through 1-31-76)	2,500,000	3,000,000
DEPARTMENT OF LABOR SUB TOTAL	7,374,833	8,715,000
<u>DEMONSTRATION CITIES AND METROPOLITAN DEVELOPMENT ACT OF 1966, AS AMENDED</u>		
MODEL NEIGHBORHOOD	900,000	Funding Terminated

OFFICE OF FEDERAL, STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS

	<u>1975-1975 APPROVED FUNDS</u>	<u>1975-1976 PROJECTED FUNDS</u>
<u>ECONOMIC OPPORTUNITY ACT OF 1964, As Amended</u>		
HEAD START	1,003,956	1,003,956
PARENT-CHILD CENTER	185,000	185,000
FOLLOW THROUGH	311,007	311,007
ECONOMIC OPPORTUNITY ACT OF 1964 SUB TOTAL	1,499,973	1,499,973
<u>EDUCATION PROFESSIONS DEVELOPMENT ACT</u>		
PART D	494,040	Funding Terminated
EDUCATION PROFESSIONS DEVELOPMENT ACT	494,040	
<u>ADULT EDUCATION ACT</u>		
R.E.A.D.	319,694	350,000
U.A.E.I.	60,303	75,000
QUAD COUNTY	95,000	95,000
STATE AID		
R.E.A.D.	300,034	350,000
U.A.E.I.	78,508	90,000
ADULT EDUCATION ACT SUB TOTAL	853,512	900,000
<u>VOCATIONAL EDUCATION</u>		
<u>AMENDMENTS OF 1963 (OPERATION GUIDANCE)</u>		
(OPERATION GUIDANCE)	10,000	10,000
NURSING EDUCATION	23,673	32,413
VOCATIONAL EDUCATION SUB TOTAL	33,673	42,413

OFFICE OF FEDERAL, STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS		
	1974-1975	1975-1976
	<u>APPROVED FUNDS</u>	<u>PROJECTED FUNDS</u>
<u>MISCELLANEOUS</u>		
WAYNE COUNTY JUVENILE FACILITIES NETWORK		
PROJECT Y.E.S.	12,000	20,000
YOUTH WORK EXPERIENCE (through 11-00-75)	<u>32,800</u>	<u>33,000</u>
JUVENILE FACILITIES NETWORK SUB TOTAL	46,000	53,000
DEPARTMENT OF EDUCATION BUDGET BILL, SECTION 23		
	63,872	128,000
MICHIGAN EMPLOYMENT SECURITY COMMISSION		
PROJECT W.I.N. SCHOOL SERVICE ASSISTANTS	3,729	4,000
VOCATIONAL SKILL TRAINING	<u>62,912</u>	<u>70,000</u>
MICHIGAN EMPLOYMENT SECURITY COMMISSION SUB TOTAL	66,641	74,000
MICHIGAN DEPARTMENT OF EDUCATION		
CRITERION REFERENCED TEST ITEM		
CONSTRUCTION Grades 1,4,7 and 10	30,000	
MICHIGAN DEPARTMENT OF SOCIAL SERVICES,		
ACT 47 of Public Acts of 1964		
MURRAY-WRIGHT Infant-Toddler		
CENTER PROJECT	89,385	89,385
TAU BETA CAMP		
STATE AID, SECTION 10	20,620	20,620
REHOBOTH FUND	14,000	14,000
MARCH OF DIMES	<u>1,500</u>	<u>1,500</u>
SUB TOTAL	36,120	36,120

OFFICE OF FEDERAL, STATE AND SPECIAL PROGRAMS

FEBRUARY 20, 1975

SUMMARY

1974-75 APPROVED FUNDS AND 1975-76 PROJECTED FUNDS		
	1974-1975	1975-1976
	<u>APPROVED FUNDS</u>	<u>PROJECTED FUNDS</u>
<u>ENVIRONMENTAL EDUCATION ACT</u>		
DETROIT ENVIRONMENTAL EDUCATIONAL PROJECT		55,170
<u>LAW ENFORCEMENT ASSISTANCE ACT</u>		
LAW ENFORCEMENT CAREER EDUCATION		<u>270,000</u>
MISCELLANEOUS SUB TOTAL	330,999	743,665
TOTAL	<u>48,173,700</u>	<u>50,797,810</u>

OCT 26 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No. — **76-447**

WILLIAM G. MILLIKEN, et al.,
Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF DETROIT, et al.,
Respondents,

RONALD BRADLEY, et al.,
Respondents.

**BRIEF FOR BRADLEY RESPONDENTS
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

October Term, 1976

No. _____

WILLIAM G. MILLIKEN, et al.,
Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF DETROIT, et al.,
Respondents,

RONALD BRADLEY, et al.,
Respondents.

**BRIEF FOR BRADLEY RESPONDENTS
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit remanding the case to the District Court for further proceedings (Pet. App. 151a-190a) is not yet reported. Reported opinions of the District Court on the desegregation order entered below are set forth at 402 F. Supp. 1096 (Pet. App. 71-881) and 411 F. Supp. 943 (Pet. App. 103a-111a). Ancillary orders of the District Court (Pet. App. 1a-2a, 89a-101a, 113a, 115a-144a, and 145a-149a) are not reported. Earlier opinions of the court below pertaining to the finding of acts of *de jure* segrega-

tion by the State petitioners (not reprinted in the Appendix to the Petition) are reported at 433 F.2d 897 and 338 F. Supp. 582, *affirmed*, 484 F.2d 215.

Jurisdiction

The Court of Appeals' judgment remanding the case to the District Court was rendered on August 4, 1976. This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the courts below erred in directing state defendants, found to have committed acts causally productive of *de jure* segregation in a public schools system, to bear partial costs of implementing educational and administrative components found below to be necessary to the proper effectuation of a desegregation plan.

Statement

This case originated in April 1970 when the Detroit Board of Education adopted a plan to alter senior high school attendance zones over a three-year period in order to promote racial integration in the city schools. Within three months the legislature of the State of Michigan reacted with legislation designed to thwart that local effort; one section of the legislation specifically delayed implementation of the Detroit Board's plan. *See Bradley v. Milliken*, 433 F.2d 897 (6th Cir. 1970) (holding that provision to be unconstitutional). Plaintiffs' complaint was filed on August 18, 1970. The District Court found that both the city and state defendants had engaged in acts causally productive of system-wide racial discrimination

and, after reviewing several proposed remedial alternatives, directed preparation of an inter-district school-desegregation remedy. *Id.*, 338 F. Supp. 582 (E.D. Mich. 1971). The Court of Appeals affirmed the District Court's findings on *de jure* segregation and its findings and conclusions respecting Detroit-only desegregation plans. *Id.*, 484 F.2d 215 (6th Cir. 1973).

The present stage of this litigation commenced with this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974). This Court reversed the judgment of the Court of Appeals insofar as it had approved a principle of an inter-district school-desegregation remedy upon an erroneous legal standard. The cause was remanded for further proceedings in the courts below directed toward development of a remedy for racial discrimination within the Detroit city school system, a remedy which this Court recognized to have been too long delayed. *Id.* at 753.

On remand the District Court directed the parties to submit proposed desegregation plans and as an interim measure on May 21, 1975, reinstated its July 11, 1972, order directing acquisition of additional school buses to be used in implementing such plan as the Court might later approve. The Court of Appeals modified the order to direct the Detroit school board to acquire the transportation equipment with the state defendants to bear seventy-five per cent of the cost. 519 F.2d 679 (Pet. App. 3a). This Court denied the state defendants' petition for writ of certiorari. 423 U.S. 930 (1975).

On August 15, 1975, the District Court entered a memorandum opinion (Pet. App. 7a) rejecting the proposed desegregation plans as submitted and setting forth remedial guidelines for development of a final plan. That opinion encompassed the Detroit Board's proposal to include administrative and educational adjuncts to pupil

reassignment which are the subject of the present petition here. The plaintiffs immediately appealed. On November 4, 1975, the District Court modified and approved the Detroit Board's final desegregation plan; its judgment was separately entered on November 20, 1975. The plaintiffs appealed from entry of that judgment. The District Court's final judgment, including continuance of the pupil-assignment plan earlier approved, and its modifications and approval of the Detroit Board's development of an inservice teacher-training program and nondiscriminatory programs for reading and communications skills, testing, and counseling and career guidance, was entered on May 11, 1976. (Pet. App. 115a.) Various other District Court opinions and orders on matters ancillary to pupil desegregation were entered between the August 15th and May 11th opinions.

On appeal the Court of Appeals affirmed the pupil-assignment aspects of the court-approved plan but remanded for further consideration of the exclusion from desegregation of three out of eight subdistricts of the Detroit system. Insofar as is pertinent to the present petition, the Court of Appeals affirmed the inclusion of educational components in the implementation of a Detroit-only plan of desegregation. The District Court had found: "the components we order are necessary to repair the effects of past segregation, assure a successful desegregation effort and minimize the possibility of resegregation." 402 F. Supp. at 1118 (Pet. App. 117a). The Court of Appeals held: "This finding is not clearly erroneous, but to the contrary is supported by ample evidence." (Pet. App. 170a.) As to the state defendants' contention, reiterated in its petition in this Court, the Court of Appeals said:

The decision of the District Court in the present case imposes no money judgment on the State of

Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

The eleventh amendment contention of the State defendants is without merit.

We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have a causal relation to the de jure segregation that exists in Detroit

Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no diminution in the quality of education [Pet. App. 178a-179a.]

The state defendants sought in this Court a stay of the Court of Appeals' mandate insofar as it affected them. The state defendants' motion was denied by Mr. Justice Stewart on September 1, 1976.

Reasons For Denying the Writ

1. The issue sought to be brought on for review by this Court is neither worthy of invoking this Court's certiorari jurisdiction nor ready for this Court's consideration.

A. Essentially the state defendants are taking and have taken in the courts below the position that school desegregation in the city of Detroit is to them a matter of relative indifference except insofar as they might be required to assist in financing a feasible remedy. The obligation imposed on the state defendants by both the District Court and the Court of Appeals is not a matter of vicarious liability. The state defendants have been found, in findings never modified or reversed, to have themselves substantially contributed to racial isolation in the Detroit city schools. Indeed, a state legislative interposition, for a time successful, between the Detroit Board of Education and its effort toward voluntary fulfillment of its constitutional obligation sparked this litigation. It is not within the purview of the present petition to question the finding of the courts below that "Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit" (Pet. App. 179a); and there is neither warrant nor authority for overturning the District Court's finding, affirmed by the Court of Appeals, that the aspects of the plan here challenged "are necessary to repair the effects of past discrimination, assure a successful desegregation effort and minimize the possibility of resegregation," (Pet. App. 117a).

B. The petition does not suggest a conflict among the circuits on the matters offered for review. Courts in other circuits have, as occasion required, included adjuncts to or education components of pupil and faculty desegregation plans. See, e.g., *United States v. Jefferson County Board of Education*, 380 F.2d 385, 394 (5th Cir. 1967) (en banc) (remedial programs); *Morgan v. Kerrigan*, 401 F. Supp. 216, 246, 264 (D. Mass. 1975), *affirmed*, 530 F.2d 401, 428 (1st Cir. 1976), *cert. denied*, 44 U.S.L.W. 3717 (June 14,

1976) (state financial assistance); *United States v. State of Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *affirmed*, 466 F.2d 518 (5th Cir. 1972) (staff training, counseling, special education). Provisions for in-service teacher training were required by all of the desegregation plans prepared by the United States Department of Health, Education and Welfare which this Court ordered to be implemented *pendente lite* in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). Contrary to the instant petition, overriding significance is not normally accorded such matters, which have perhaps been accorded greater importance in this case because of the effort to avert a resegregative reaction to desegregation. Moreover, as the state defendants' petition conceded (Petition at 12), as matters presently stand there are schools in the Detroit city school system which have been found to be segregated *de jure* and which will see only those aspects of the desegregation plan here at issue. That the critical focus in this and any other school-desegregation case is desegregation of pupils and faculties conduces against this Court's piecemeal review of relatively less significant aspects of a court-approved desegregation plan.

C. The State defendants' petition for writ of certiorari relies on a suggestion of projected financial expenditures which is not part of the record and has not been presented to the courts below for their consideration. The disposition of that side of the issue presented—whether the actual burden of carrying out the state defendants' remedial obligation is too great or disproportionate to the sustainable—has not been decided upon a record of actual costs. Nothing prevents the state defendants from making such a record in the lower courts and seeking modification in light thereof of the general duty imposed below.

2. The decisions of the courts below are not in conflict with *Edelman v. Jordan*, 415 U.S. 651 (1974).

In *Edelman* this Court held that the Eleventh Amendment barred a federal court's granting a monetary award in the nature of damages or restitution for past benefits wrongfully withheld. To be sure, the injunction issued in this case is "not totally without effect on the State's revenues," 415 U.S. at 667, but the fiscal consequences to the state in this case are "the necessary result of compliance with decrees which by their terms were prospective in nature," *id.* at 668. Any school-desegregation decree will necessarily entail some cost. Merely by seeking to share that cost among all parties found to have engaged in conduct causing *de jure* racial discrimination does not convert the remedy into an "award" nor does it render the decree retroactive. In any event, the effect, if any, of the Eleventh Amendment on school-desegregation decrees in general has been insufficiently considered by the Circuit Courts of Appeals to require this Court's consideration at this time.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Supreme Court, U. S.
IN THE SUPREME COURT OF THE UNITED STATES D

October Term, 1976

OCT 28 1976

No. 76-447

MICHAEL RODAK, JR., CLERK

WILLIAM G. MILLIKEN, Governor of the State of Michigan; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan, and ALLISON GREEN, Treasurer of the State of Michigan,

Petitioners.

- vs -

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO.

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

RILEY AND ROUMELL

GEORGE T. ROUMELL, JR.

JANE K. SOURIS

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Dated: October 27, 1976.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. 76-447

WILLIAM G. MILLIKEN, et al,

Petitioners,

v

RONALD BRADLEY, et al,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Respondent, the Board of Education for the School District of the City of Detroit, respectfully prays that this Petition for Writ of Certiorari be denied.

OPINIONS AND ORDERS BELOW

Respondent, Detroit Board of Education for the School District of the City of Detroit adopts Petitioners' statement of Opinions and Orders of the courts below.

JURISDICTION

Respondent, Detroit Board of Education for the School District of the City of Detroit adopts Petitioners' statement of Jurisdiction.

QUESTIONS PRESENTED

I.

Whether the decision of the Court of Appeals affirming inclusion of educational components in Detroit's desegregation

plan was clearly within its equity powers and supported by record evidence?

II.

Whether the Constitution or decisions of this Court prohibit the lower courts here from compelling the State defendants who have been found guilty of *de jure* segregation to pay for part of the cost of desegregation?

III.

Have any significant questions of federal law been raised in this Petition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a school desegregation case. While the issues raised by the petitioners, the State defendants, concern the remedial phase of this case, the State defendants would have this Court ignore the fact that the remedial phase was preceded by a violation stage initiated by a complaint filed on August 18, 1970 by individual black and white school children and their parents, and the Detroit branch of the NAACP against the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools, as well as the Governor, the Attor-

ney General, the State Board of Education and the State Superintendent of Public Instruction. The Treasurer of the State of Michigan was subsequently added as a defendant. The complaint alleged that the Detroit public school system was segregated on the basis of race as the result of actions and policies of the Board of Education and of the State of Michigan as well. The litigation was triggered by the passage of Act 48 of the Public Acts of 1970 by the State Legislature. This State Act was a deliberate attempt to stop the Detroit Board which was implementing its own desegregation plan.

After trial of the case on the issue of segregation, the District Court held that the Detroit public school system was racially segregated as a result of the unconstitutional practices of both the defendant Detroit Board and the Michigan State defendants. 338 F Supp at 582.

Further proceedings concerning proposed desegregation plans culminated in an Order of the District Court requiring preparation of a metropolitan desegregation plan.

The United States Court of Appeals affirmed the findings of *de jure* segregation against the Detroit Board and the State defendants, 484 F2d 215. The constitutional violations found to have been committed by the State of Michigan are set forth at pages 238-241 of that opinion.

While this Court in *Milliken v Bradley*, 418 US 717 (1974), remanded the case for formulation of a desegregation plan limited to the city boundaries of the City of Detroit, this Court did not reverse the finding that the State of Michigan had committed acts of *de jure* segregation.

Upon remand, the case was assigned to the Honorable Robert E. DeMascio who ordered both the Detroit Board and the plaintiffs to submit desegregation plans, and ordered the State Board of Education to submit a critique of the Detroit Plan.

The Detroit Board's desegregation plan included pupil reassignment, magnet schools and the educational components herein at issue. These "components" are educational programs to be added to the regular school curriculum because they are

essential to eradicate the effects of past segregation and to the implementation of an effective desegregation plan for Detroit. 402 F Supp at 1118-19 (36a).¹

The legal propriety of these educational components in a desegregation plan, and the liability of the State defendants for their share of the cost of implementing them are the only issues raised by petitioners. All other matters, such as pupil reassignment, faculty reassignment and bus purchases are irrelevant in this appeal and are not discussed herein.

Extensive hearings were held on the two plans submitted by plaintiffs and the Detroit Board. On August 15, 1975, the District Court entered its Memorandum Opinion and Remedial Decree (7a) in which it found that nine educational programs were needed to remedy the effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. Among these nine were the programs of reading, in-service training, testing and counseling and guidance which are specifically at issue here because the State defendants have been ordered to share the cost of their implementation. Components implemented by the Detroit Board alone have not been the subject of any appeal.

The Court's finding that these programs were essential to the implementation of a desegregation plan in Detroit is amply supported by the record testimony of witnesses of the Detroit Board, among them Dr. Edward Simpkins, Dean of Wayne State University School of Education; the plaintiffs' experts, Dr. Gordon Foster and Dr. Michael Stolee; and by the State defendants' own expert, Dr. Charles Kearney, Associate Superintendent for Research and School Administration of the Michigan Department of Education, who testified that educational components were "required" to desegregate. (Vol. XXX, Tr.179).

The District Court's Partial Judgment and Order of August 15, 1975 (89a) directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (95a), and directed the Detroit Board to

¹ Hereafter, page numbers followed by the letter (a) and enclosed in parentheses refer to the Appendix to Petition for Certiorari.

institute comprehensive programs for in-service training, counseling and career guidance, testing, (95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (92a). The parties responded by filing the requisite submissions with respect to those educational components that are the subject of this petition for review: reading and communication skills, in-service training, testing and counseling and career guidance.

These submissions on the four components to be implemented were prepared by the staff of the Detroit Public Schools, and clearly indicate that the programs to be implemented are not expansions of existing programs (as the State has characterized them) but are new programs developed, pursuant to Court order, to meet the needs of a school system undergoing desegregation. The District Court entered various orders approving these submissions and ordering their implementation.

On May 11, 1976, the District Court entered its final Judgment in this matter. (145a). The Judgment ordered into effect in the Detroit School system on or before the September, 1976 school term comprehensive programs for: a) Reading and Communications Skills, b) In-Service Training, c) Testing, [and] d) Counseling and Career Guidance, and ordered the State Defendants to pay one-half the additional cost. (146a-147a).

Pursuant to the May 11, 1976 Order, the District Court required the Detroit Board to submit to the State Board of Education "its highest budget allocated in any year for each of the above-enumerated quality education programs", and thereafter, compute "the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs". This was referenced to the reading, in-service, testing, and counseling components.

The Sixth Circuit's concern over the financing of the educational components essential to desegregating Detroit stems from the clear record evidence that the Detroit Board, indeed, has serious financial problems. The reasons for these financial problems, including the adoption of a survival budget, bankruptcy of the system, constant millage failures and an eroding tax base,

were confirmed and recognized by the Sixth Circuit in the Appendix to its opinion. *Bradley v Milliken*, ___F2d ___, (August 4, 1976), Slip Op. at 33-40.

Recognizing that both the State defendants and the Detroit Board were found guilty of acts of *de jure* segregation, and recognizing the precarious financial plight of the Detroit school system, the wisdom of equity, as exercised by the District Court and affirmed by the Sixth Circuit, set as the basic ground rule here that the wrongdoing co-defendants should share the cost of the remedy.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS AFFIRMING INCLUSION OF EDUCATIONAL COMPONENTS IN DETROIT'S DESEGREGATION PLAN WAS CLEARLY WITHIN ITS EQUITY POWERS AND SUPPORTED BY RECORD EVIDENCE.

A. Educational Components Are Within The Scope Of The Remedy For Segregation.

The State defendants argue that the equitable maxim the nature of the violation determines the scope of the remedy precludes the inclusion of educational components in a school desegregation plan because no violation was found in the areas of the four court ordered components. The State defendants rely on this Court's language in *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971), and its holding in *Milliken v Bradley*, 418 US 716 (1974).

The issue these educational components raise concerns the remedial powers of equity, not "legal standards" as the State defendants have characterized it. Neither *Swann* nor *Milliken* limits equity's power to include educational components in a desegregation plan.

The statement in *Swann* is limited by the Court's preceding discussion that while it is within the discretionary power of school authorities to decide that each school should have a racial mixture of students, to do so would not be within the authority of a federal court "absent a finding of a constitutional violation". 402 US at 16.

Swann does not limit the power of equity once a constitutional violation has been found, it merely states that judicial powers may be exercised only on the basis of a constitutional violation. *Swann* also holds that once a violation is found, judicial authority may be invoked and its remedial powers are broad.

"* * * Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (402 US at 15)

Therefore, the language the State defendants rely on in *Swann* is not applicable in the context of this case because the constitutional violation of segregated schools has been found to have been committed by the State defendants as well as the Detroit Board. Consequently, the Court has the right and the duty to exercise its broad equitable powers in fashioning a remedy. Nor does this Court's decision in *Milliken* exclude educational components under the facts of this case. In *Milliken*, this Court reversed a remedial decree that involved parties against whom no constitutional violation had been alleged or proved. In this case, the remedy is confined to the parties found to have committed the violation and to the particular school district in which the violation occurred.

The State urges this Court to hold that the constitutional violation of segregation of the races in public schools means only that blacks and whites do not attend schools together, and that the Federal Courts are powerless to order any remedy for segregation other than pupil reassignment. This is not the law.

A desegregation plan which includes programs in reading, testing, in-service training and counseling and career guidance is within the scope of the remedy a court of equity may order because the constitutional violation of segregation caused the deterioration both of the quality of education and of school facilities. Educational components are designed to correct conditions caused by segregation. Consequently, these components are a proper part of the remedy.

Secondly, in a desegregation plan these educational components are within the scope of equity's remedial powers because

they are necessary to make a plan realistically work now and in the future.

1. The Nature of The Violation

Ever since *Brown v Board of Education of Topeka*, 347 US 483 (1954), courts have recognized that the evil of segregation is not the fact of separation but the effects of separation.

*** We must look instead to the effect of segregation itself on public education.

* * *

*** To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with a sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' '' (347 US at 492-494).

Since *Brown*, numerous courts have recognized that the effects of segregation are not limited to the physical separation of the races, but extend to and affect all aspects of education, as pointed out by Justice Brennan in describing the segregated school system of New Kent County:

*** Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of

school operations — faculty, staff, transportation, extracurricular activities and facilities." *Green v School Board of New Kent County*, 391 US at 430, 435 (1968).

In this case of *Bradley*, plaintiffs alleged a denial of equal educational opportunity, in paragraph XVIII of their Complaint. There is record evidence at the violation stage of this case, which the State defendants conveniently ignore, that the effects of segregation extended virtually to every facet of school operations and that black school children of Detroit suffered many ill-effects from segregation. For example, by the eighth grade, predominantly black schools were on the average two or more grade levels behind predominantly white schools as measured by standard achievement test scores. (8 Tr. 1008-09).² There is absolutely no evidence in the record that such disparity resulted from some inherent inferiority of black children as a group compared to white children. Rather, as a group and on the average black and white children arrive in school with the same potential and much the same levels of tested achievement. (8 Tr. 874-876m 933). Only thereafter, with the experience of school segregation, does this tested achievement disparity appear and grow. (8 Tr. 874-876; P.Ex. 134A).

Black children received less of the district's teaching and monetary resources. More emergency substitutes, fewer highly paid and experienced teachers and more inexperienced and low-paid teachers were assigned to black schools than to white. (P.Ex. 161A-C, 162A-C, 164A-C). Per pupil expenditures of the district's own funds (as distinguished from federal and state compensatory funds) was between 40 and 50 dollars less in black schools than in white schools (P.Ex. 163A-C, 164A-C, 163AA-CC, 164AA-CC), and the average salary of teachers assigned to black schools was between \$1800 and \$1900 less than the average salary of teachers assigned to white schools (P.Ex. 163A-C, 164A-C, 163AA-CC, 164AA-CC, Def. Ex. NNN).

2. The Scope Of The Remedy

While the central issue in *Swann* dealt with problems of student assignment, the Court recognized that because the ef-

² Transcript and exhibit references are to the violation hearings.

fects of segregation can and do take many forms, the remedy of desegregation properly may encompass more than mere pupil reassignment.

"* * * Although the several related cases before us are primarily concerned with the problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

"In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 US, at 435, 20 L. ED 2d at 722. Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." (402 US at 18).

Desegregation is an equitable remedy. The broad power of a court of equity to fashion remedies has been described many times, but never more eloquently than by Justice Felix Frankfurter writing for this Court in *Hecht v Bowles*, 321 US 329 (1944), when he stated, at pages 329-330:

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

In an earlier case, this Court spoke to the matter of the flexibility of equity's remedial powers as follows:

"* * * Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all parties before them." *Alexander v Hillman*, 296 US 222 (1935).

Speaking to the remedial obligations of a court of equity in a discrimination case, this Court stated:

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v United States*, 380 US 145, 154 (1965).

Recently in a housing discrimination case, the United States Court of Appeals, Eighth Circuit, echoed this same theme, that in devising a remedy a court of equity must repair all of the damage suffered by the party suffering the discrimination:

"The goal of equitable relief . . . is to restore the plaintiff to the enjoyment of the right which has been interfered with to the fullest extent possible. . . ." *Graves v Romney*, 502 F2d 1062, 1064-65 (8th Cir. 1974).

Thus, when a constitutional violation has been found, courts of equity have the power to devise flexible remedies which are suited to the circumstances of the case and which have the qualities of mercy and practicality. In addition, in devising remedies courts of equity are charged with the duty to eliminate all past wrongs and to prevent future wrongs.

Each school desegregation case is unique. In reviewing specific desegregation plans every appellate court has stressed the fact that for the school system then under judicial scrutiny, the plan does or does not meet constitutional requirements. "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case", *Green v School Board of New Kent County*, 391 US 430, 439 (1968); "* * * the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstance", *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1, 17 (1971); "However, for today and in Atlanta, the unique features of this district distinguish every prior school case pronouncement", *Calhoun v Cook*, 522 F2d 717, 719 (5th Cir. 1975).

Because each school desegregation case must be decided on its own facts, and because equity's remedies are flexible and expansive courts must be free to fashion new remedies or

modify old remedies, in order to meet the requirements of each case. For example, in unanimously affirming that part of the district court's decision involving a program for quality education in magnet schools, the court in *Morgan v Kerrigan*, 530 F2d 401 (1st Cir. 1976), *cert. denied* 96 S Ct 2648 (1976), stated:

"This provision of the order being innovative is without precise precedent in other cases. But in light of the background of the case and the particular objective being served, we hold the best efforts provisions to be within the equitable discretion of the court." (530 F2d at 429)

Surely this Court would not limit the innovative powers of lower courts to desegregate by accepting the State defendants' theory that the only judicially available remedy for segregation is pupil reassignment.

The District Court was faced with the problem of restoring the plaintiffs to "the enjoyment of the right which has been interfered with to the fullest extent".

Remedial hearings lasted six weeks. Based on the unrefuted testimony of witnesses of the plaintiffs, the Detroit Board and the State defendants, the District Court made the following findings of fact regarding the need for educational components in the Detroit desegregation plan:

"* * * We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation. In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing, discriminatory counseling and discriminatory application of student discipline. In a system undergoing desegregation, teachers will require orientation and training for desegregation. Parents need to be more closely involved with the school system and prop-

erly structured programs must be devised for improving the relationship between the school and the community.

* * *

"Additionally, we find that a testing program, vocational education and comprehensive reading programs are essential. We find that a comprehensive reading instruction program together with appropriate remedial reading classes are essential to a successful desegregative effort." 402 F Supp at 1118-19. (36 a and b).

In affirming this finding of the District Court, the Court of Appeals stated:

"This finding of fact is not clearly erroneous but to the contrary is supported by ample evidence."

The Court of Appeals commented on the four programs at issue as follows:

"The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools."

* * *

"Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

"Accordingly, we conclude that the findings of the District Court as to the Educational Components are supported by the record. This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' See, *Keyes v School District*, 521 F2d 465, 483 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (US Jan. 12, 1976). We hold that the District Court acted within its equity powers in requiring the Educational Components as a part of the remedy.

The decision of the District Court prescribing these components is affirmed." (170, 171a).

The District Court's finding that educational components are a necessary part of this desegregation plan is not analogous to the finding of the District Judge which lead to including suburban school districts in the remedy. A multi-district remedy was reversed by this Court on the ground that no remedy could be imposed on suburban districts when there was no record evidence "that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit." *Milliken v Bradley*, *supra*, 418 US at 752.

In the instant case, the District Judge's finding that educational components are required "to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation" (36a) is based on the record testimony of witnesses called by the Detroit Board, plaintiffs and the State defendants. The State defendants do not dispute the fact that this testimony is unrefuted. The only parties included in the remedy of educational components are the defendants found to have committed the violation of *de jure* segregation, namely the State defendants and the Detroit Board. The State defendants have misconstrued this Court's decision in *Milliken*, and ignored the fact that they have been found guilty of segregation.

These components must be reviewed in the context of the facts as they exist in Detroit, Michigan. They are one part of an equitable remedy designed to eliminate, to the fullest extent possible, all of the damage done by segregation and to make the remedy of desegregation lasting and meaningful. The State defendants have raised a spurious legal issue by claiming that there must be a violation found with respect to educational programs before educational components can be included in a desegregation plan.

Two lower courts have found that it is clearly within the power of a court of equity to include educational components in a desegregation plan when the record abundantly supports a need for them as part of the remedy for segregation.

B. There Is No Conflict With Other Jurisdictions

As a second reason for granting their petition, the State argues that the decision is in conflict with *Keyes v School District No. 1, Denver, Colorado*, 521 F2d 465 (10th Cir. 1975). However, the *Keyes* case is easily distinguished, because it does not hold that a desegregation plan must be restricted to procedures which effect only the racial composition of the schools.

In *Keyes*, the District Court ordered the implementation of the Cardenas Plan for the bicultural-bilingual education of minority students. The school district opposed this. The Court of Appeals reversed the District Court, not because a desegregation plan could not include such a program, but because the program to be implemented represented a complete overhaul of the system's approach to education of minorities and was to be arbitrarily imposed on reluctant school authorities by the Court.

"* * * But the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. *Instead of merely removing obstacles to effective desegregation*, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far." (521 F2d at 482, emphasis added).

It is obvious that *Keyes* spoke only to the particular plan adopted by the District Court and opposed by school authorities. It does not stand for the State's theory that the inclusion of educational components in a desegregation plan exceeds the remedial powers of a court of equity. In fact, no court has so held, and we remind this court that the concept of quality education in a desegregation plan has been approved in *Hart v Community School Board of Brooklyn, New York School District #21*, 383 F Supp 699 (E.D. N.Y. 1974), *aff'd*, 512 F2d 37 (2nd Cir. 1975) and *Morgan v Kerrigan*, 530 F2d 401 (1st Cir. 1976).

The remedy of educational components in a school desegregation plan does not exceed the nature of the violation of segregated schools. Instead such a remedy falls within the broad power of equity to correct the violation to the fullest extent

possible by taking whatever steps are necessary to correct that violation.

The cases of *Brown v Board of Education*, 347 US 483 (1954), and *Pasadena City Board of Education v Spangler*, ___ US ___, 96 S Ct 2697 (1976) are totally inapplicable because the issue of the propriety of educational components in a school desegregation plan was neither raised, nor decided in those cases.

Swann and Milliken are not applicable in the instant case. A violation has been found as to both the State and the Detroit Board. Therefore, this case is not within the language of *Swann*. New parties against whom no violation has been found are not to be included in the remedy. Therefore, *Milliken* does not apply. The District Court simply devised a remedy designed to eradicate the effects of a proven violation and ordered the parties found to have committed *de jure* acts of segregation to participate in that remedy.

II.

NEITHER THE CONSTITUTION NOR DECISIONS OF THIS COURT PROHIBIT THE LOWER COURTS HERE FROM COMPELLING THE STATE DEFENDANTS WHO HAVE BEEN FOUND GUILTY OF DE JURE SEGREGATION TO PAY FOR PART OF THE COST OF DESEGREGATION.

A. The State Defendants Are Proper Parties To Finance A Remedy for Constitutional Violations They Have Committed.

In resisting any efforts to be included in a Detroit-only remedy, the State defendants have argued two basic erroneous theories: (1) Inasmuch as no constitutional violations have been proven against the State defendants in the area of school district finance, there is thus no duty by the State defendants to disperse State funds from the State treasury as an incident to the implementation of a desegregation plan; and, (2) the Tenth and Eleventh Amendments bar a prospective injunctive order for school desegregation which requires the payment of State funds from the State treasury to implement the remedy.

At the initial violation stage of this litigation the District Court and the Sixth Circuit clearly and emphatically found that the State defendants were a substantial cause of the violation of the constitutional rights of Detroit school children. *Bradley v Milliken*, 338 F Supp 582, 589 (E.D. Mich. 1971); *Bradley v Milliken*, 484 F2d 215, 238-241 (6th Cir. 1973). Though the State defendants urged this Court to overturn the findings of State responsibility for *de jure* segregation in the Detroit school system, in their 1973 Petition for Writ of Certiorari, at page 12, this Court did not do so. In fact, this Court affirmed the finding that the State defendants were guilty of acts of *de jure* segregation in Detroit. *Milliken v Bradley*, 418 US 717, 725-728, 746 (1974). It was subsequently reaffirmed when this Court interpreted *Milliken* and unanimously stated "... The State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 US at 734-735, note 16 ...". *Hills v Gautreaux*, 96 S Ct 1538, 1545, n. 13 (1976).

In the August 4, 1976 decision the Sixth Circuit was only reiterating what is obvious by the history of the litigation of this case when it stated:

"It is the law of this case that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in creating *de jure* segregation which exists in the public schools of Detroit". *Bradley v Milliken*, ___F2d ___. (155a).

The issue here is not a revisiting of *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973). The issue here is whether co-defendants guilty of a constitutional violation should share in the cost of remedying that violation. The statement of the issue makes this case almost textbook law.

Once State action has been established and has been determined to be "causally related to the substantial amount of segregation found in the Detroit school system", *Bradley, supra*, 484 F2d at 241, then it is within the federal courts' broad equity power to require the State defendants to remedy this segregated condition. *Cooper v Aaron*, 358 US 1, 16 (1958); *Evans v Buchanan*, 379 F Supp. 1218, 1221-1222 (D. Del. 1974).

aff'd 423 US 963 (1975), *reh. denied*, 423 US 1080 (1976); *Oliver v Michigan State Board of Education*, 508 F2d 178, 187, (6th Cir. 1974), *cert. denied*, 421 US 963 (1975).³ State officials may be ordered to take the necessary measures to completely eliminate from the Detroit public schools "all vestiges of state-approved segregation". *Swann*, 402 US at 15; *See also, Bradley v Milliken*, 338 F Supp. 582, 593-594 (E.D. Mich. 1971).

Inasmuch as these State defendants, unlike few other school cases, have been found guilty of *de jure* segregation, they have an obligation to remedy the existing segregation in Detroit without curtailing the necessary educational programs presently in operation in Detroit schools. This principle was stated in *Hart v Community School Board of Brooklyn*, 383 F Supp 699 (E.D.N.Y. 1964), *aff'd*, 512 F2d 37 (2nd Cir. 1975), wherein the Court described the State's responsibility in a desegregation plan as follows:

"As part of the State's obligation to eliminate segregation there is, of course, a concomitant obligation to insure that there is no diminution in the quality of education . . .". 383 F Supp at 741.

The State defendants, as wrongdoers, may not sit by idly and attempt to excuse themselves from the remedy which their unconstitutional actions have made necessary and argue that the financing of the desegregation plan is in contravention of state law. Such a concept makes a mockery of the Constitution and nullifies both *Brown I* and *Brown II*.

In devising a remedy for school segregation a federal court is not bound by state law. A desegregation plan is a matter of a

³ In *United States v Board of School Commissioners of Indianapolis*, 503 F2d 68, 80, 82 (7th Cir. 1974), the Seventh Circuit found an affirmative duty on the Indiana state officials to assist in desegregating the Indianapolis school system. In *Morgan v Hennigan*, 379 F Supp 410, 477 (D. Mass. 1974), *aff'd sub.nom.*, *Morgan v Kerrigan*, 509 F2d 580 (1st Cir. 1974), the Court found no constitutional violation but recognized the need to have the resources of those state officials, with state-wide control over education, and retained jurisdiction over them so that they would assist in desegregating the Boston school system. In *Brinkman v Gilligan*, 503 F2d 684, 704 (6th Cir. 1974), the appellate court directed that the Ohio state defendant be retained as parties to the action for purposes of remedying *de jure* segregation.

federal remedy for a violation of federal rights. *North Carolina State Board of Education v Swann*, 402 US 43, 45 (1971). *See Louisiana v United States*, 380 U.S. 145, 154-156 (1965); *Haney v Board of Education of Sevier County*, 429 F2d 364, 368 (8th Cir. 1970). As stated in *Milliken v Bradley*, 418 US 717 (1974):

"Of course, no state law is above the Constitution. School district lines in the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." 418 US at 744.

Thus, the State defendants erroneously seek to insulate themselves from a federal court remedial order through the subterfuge of administrative legislation designed to subordinate constitutional rights.

B. Neither The Eleventh Nor Tenth Amendments Prohibit The Power of Courts To Compel The Expenditure Of Public Funds To Remedy An Unconstitutional Condition.

The State defendants' reliance on *Edelman v Jordan*, 415 US 651 (1974) for the proposition that the Eleventh Amendment prevents the State's financial participation in remedying a constitutional violation that the State caused is misplaced. This contention has consistently been laid to rest in school cases as quickly as it has been raised. *See Cooper v Aaron*, 358 US 1 (1958); *Griffin v School Board of Prince Edward County*, 377 US 218; 328 (1964); *Swann v Charlotte-Mecklenburg Board of Education*, 318 F Supp 786 (W.D. N.C. 1970).

Although this Court has, on occasion, recognized the immunity of states from suits involving *direct* actions against governmental funds or property, when brought for the complainants' personal benefit, this Court has not deemed the Eleventh Amendment a serious impediment to judicial action when the protection of compelling constitutional guarantees has been an issue. *See e.g., Osborn v Bank of the United States*, 22 US (9 Wheat.) 738 (1824); *Graham v Folsom*, 200 US 248 (1906); *Ex Parte Young*, 209 US 123 (1908).

This Court in *Edelman* distinguished between a legally cognizable prospective injunctive relief directed toward the State as opposed to a retroactive money judgment against the State

treasury. In doing so, this Court acknowledged that orders such as those entered in *Ex Parte Young*, *supra*, and subsequent cases had, in fact, substantial impacts on State revenues. 415 US at 667.

This Court then analyzed several cases dealing with injunctive relief against welfare officials and stated that the shaping of official conduct to conform to the mandate of a court decree would most likely result in an expenditure from the State treasury. Such an ancillary effect on the State treasury is a permissible and often inevitable consequence of the principle announced in *Ex Parte Young*. 415 US at 667-668. The majority opinion thus recognized that the Eleventh Amendment would not apply "where a federal court applies *Ex Parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments . . ." 415 US at 666, n. 11.

In *Fitzpatrick v Bitzer*, ___ US ___, 96 S Ct ___, 49 LEd2d 614, 44 U.S.L.W. 5120 (1976), this Court held that the Eleventh Amendment did not bar a back pay award under Title VII enacted by Congress pursuant to Section 5 of the Fourteenth Amendment because the Eleventh Amendment provisions are limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. 49 LEd2d at 621; 44 U.S.L.W. at 5123.

Mr. Justice Stevens in a concurring opinion analyzed the Eleventh Amendment argument and stated that it does not bar an action against state officers enforcing an invalid statute. 49 LEd2d at 623, 44 U.S.L.W. at 5124. Mr. Justice Stevens then stated:

"The fact that the State will have to increase its future payments into the fund as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a state may be required to conform its practices to the federal Constitution and thereby to incur additional expense in the future." 49 LEd2d at 624, 44 U.S.L.W. at 5124.

In *Scheuer v Rhodes*, 416 US 232 (1974) this Court held that since *Ex Parte Young*, it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he has deprived another of a federal right under the

color of state law. 416 US at 237. See also *Huecker v Milburn*, 538 F2d 1241, 1243-1245 (6th Cir. 1976).

Several Courts of Appeal have found an affirmative duty for state officials to assist in remedying unconstitutional conditions and have rejected the Eleventh Amendment arguments of state officials attempting to avoid constitutional responsibilities. *Bradley v Milliken*, 484 F2d 215, 258 (6th Cir. 1973) (holding that a federal court may order that public funds be expended to meet constitutional requirements); *Wyatt v Aderholt*, 503 F2d 1305, 1314-1315 (5th Cir. 1974) (holding that a state legislature is not free, for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individuals' constitutional rights); *United States v Board of School Commissioners of Indianapolis*, 503 F2d 68, 82 (7th Cir. 1974) (holding that the Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment); *Lewis v Shulimson*, 534 F2d 794, 795 (8th Cir. 1976) (holding that the notification expenses and the future medical assistance payments were the necessary result of compliance with the decree which by its terms was prospective in nature).

The decision of the lower court in the present case imposes no money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward both the Detroit Board and the State defendants as a part of a prospective plan of injunctive relief to comply with a constitutional requirement to eradicate all vestiges of *de jure* segregation "now and hereafter". *Alexander v Holmes County Board of Education*, 396 US 19, 20 (1969).

For the first time, the State defendants have now raised the question whether the lower court's orders violate the Tenth Amendment. Neither the District Court nor the Sixth Circuit Court of Appeals was ever given the opportunity to review this argument. The Supreme Court cannot decide issues raised for the first time in this Court. *Tacon v State of Arizona*, 410 US 351, 352 (1973).

The primary reliance for the improper Tenth Amendment proposition is this Court's recent decision in *National League of Cities v Usery*, ___ US ___, 96 S Ct 2465 (1976). The holding in

Usery is inapposite to this proceeding and to the facts and the law of this case.

Usery dealt with a challenge to the exercise of Congress' power to regulate commerce. 96 S Ct at 2475. Whereas this Court found in *Usery* that the Fair Labor Standards Act resulted in an interference with the conduct of integral governmental functions, it is difficult to perceive how the vindication of constitutional rights in this case would in any meaningful manner infringe upon 'functions essential to the separate and independent existence' of the Michigan state government.

The requirement that the State defendants, as a part of a prospective plan to comply with a constitutional mandate, expend funds does not 'curtail in any substantial manner the exercise of state powers'. Rather, it lawfully requires state officials to conform their actions to the requirements of the Constitution.

Given the findings of state violations, the consequent remedial obligation of the Fourteenth Amendment and the inclusion of the necessary state party defendants in this action, sound logic and settled law dictate that the State defendants are the proper parties to assist in the remedy. In this regard, the order of the lower court does not diminish or interfere with any "policy choices" under the 10th Amendment which the State defendants, by their previous unconstitutional actions, have not already precluded themselves from performing.

Neither the Tenth nor the Eleventh Amendments bar the inclusion of State defendants in the prospective injunctive relief required in Detroit even if that relief has an ancillary effect upon a State treasury.

It is interesting to note that these same State defendants did not object to the requirement of the June 19, 1975 Order of the Sixth Circuit Court of Appeals relative to the purchase of 150 school buses. 519 F2d 679, 680 (6th Cir. 1975), *cert. den'd.*, 423 US 930 (1975). Presumably, the requirement of that Order that the State defendants 'allocate and re-allocate existing or new funds' was just as objectionable under the Eleventh Amendment as is the present Order of the lower court which these same defendants seek to have reviewed.

It becomes readily apparent that the present State defendants through the exercise of the inherent powers which they possess as officers and instrumentalities of the state and through the persuasive powers which their officers command, can and should effectuate and implement the educational components ordered by the lower court. The State defendants have not and cannot cite cases holding that State defendants, having been found guilty of segregation, cannot be required to expend the funds to correct a constitutional violation.

C. The Balancing of Interests Requires An Allocation of Costs Between the State and Detroit Board Defendants.

At pages 23-26 of their Petition, the State defendants claim that the state budget does not have the money to comply with the lower court order because it will end the 1975-76 fiscal year with a deficit. It is difficult to understand why the State defendants would choose to argue and allocate the costs of desegregation for the 1976-77 school year to the already expired 1975-76 state budget.

It would be logical to assume that the obligations for the 1976-1977 school year would be funded by the State defendants from the new 1976-1977 state budget.

On pages 24-26 of the Petition, the State defendants advance the same financial arguments which were considered by the lower courts in arriving at the allocation of the desegregation costs. The Detroit Board has contended that any requirement that it bear the major financial responsibility for the desegregation plan would not result in "balancing the individual and collective interests" as required by *Swann*, 402 US at 16. By arguing relative poverty, the State defendants contend that they should not be required to pay any of the costs of the desegregation programs.

Contrary to the allegations of the State defendants, the Detroit Board does not have the necessary financial resources to carry on the overall operations of the Nation's fifth largest school district and at the same time underwrite the total, or even a majority, cost of desegregation. In order for Detroit to merely maintain the *same* minimally adequate levels of programs and

services that existed in the 1975-1976 fiscal school year, for the 1976-1977 fiscal school year, a budget in the amount of approximately 336 million dollars will be required.

The anticipated general fund revenues for the fiscal year 1976-1977 are \$316,131,845.00.⁴ This means that the anticipated expenses for the present school year are approximately 20 million dollars more than the general fund revenues. This does not include any of the costs of desegregation.

The increased costs for the 1976-1977 school fiscal year over the 1975-1976 school fiscal year reflect no increase in the level of programs. The additional cost is merely the increased cost of doing business. Thus, absent additional general operating revenue dollars, programs will have to be, and have been, cut.⁵

The money coming to the Detroit Board in the form of state aid payments has already been factored into the 1976-1977 school budget.

The school system is still 20 million dollars short in an attempt to keep the minimum programs that it had in operation in the 1975-1976 school year. The general fund equity surplus in the 1975-1976 budget has been carried over and factored into the 1976-1977 budget.

⁴ This figure was originally \$320,231,845.00 but was reduced by 4.1 million dollars in state aid revenue due to the declining pupil enrollment in Detroit.

⁵ The state defendants allege that the Detroit Board will receive approximately 192.5 million dollars in state aid this school year, an increase of approximately 28.5 million dollars over the previous year funding. However, 10 million dollars of the 192.5 million dollars represents Chapter III categorical state aid funding which cannot be allocated to general operating expenses. Thus, the Detroit Board shall receive only approximately 182.5 million dollars in general operating funding from the state as reduced by 4.1 million dollars due to the declining student enrollment.

The alleged increase of approximately 28.5 million dollars from state funding sources is misleading. Although this figure has already been factored into the Detroit Board "deficit" budget for 1976-1977, this figure represents only approximately 8 million dollars in state funding for general operating purposes over 1975-1976. This increase is proportionately similar to increase all eligible school districts received in 1976-1977. 17 million dollars of the 28.5 million dollar figure represents state Aid reimbursement for local property tax loss resulting from the Michigan Single Business Tax and is not a true increase due to the offsetting decrease in local revenues. Additionally, there is the aforementioned 4.1 million dollar reduction due to declining enrollment.

When the Detroit school system realized in the summer of 1976 that there would be a \$16,000,000 deficit (it now approaches \$20,000,000 deficit by virtue of a reduction in anticipated state aid of 4.1 million dollars), and that under State law it must have a balanced budget, the Board undertook to cut existing programs. Program cuts included music programs, art programs, athletic programs, putting first graders on half day sessions, reducing the hours of instruction at the high school level as well as at middle school level. Despite a previous history of millage defeats the Board, on August 3, 1976, went to the Detroit voters, asking for a five mill increase in the school tax in order to restore the immediate cuts and to attempt to restore some of the programs that were cut back in 1971 as a result of the necessity for the Board to adopt a "suicide budget". See Appendix to Sixth Circuit's August 4, 1976 decision. (183a).

The August 3, 1976 millage election failed. Nevertheless, the Board has again placed 5 mills on the ballot for November 2, 1976. In the meantime, the State Board of Education has required the Board to restore full day classes at the first grade level as well as restore the high school programs, meaning that the district is now in serious deficit financing. Detroit is a district that during the course of this litigation has been on the verge of closing its doors because of previous deficit financing.

The State defendants correctly assess that in the event the millage vote passes, the Detroit school system would obtain approximately 37 million dollars in combined local property tax revenues and state school aid funds. However, at least 16 million dollars will be needed to restore the specific cuts in educational programs which the Detroit Board has made for the 1976-1977 school year from those same programs offered in 1975-1976. Additionally, at least 4.1 million dollars will be needed to offset the prior loss of state aid revenues due to declining enrollment. The remaining amount of the millage yield monies will be used to supplement program improvements that have been eliminated or delayed over the past several years because of previous "suicidal" budget cuts dating back to 1971. (183a-187a).

If there is any doubt about the destitute financial status of the Detroit school system this Court is again respectfully invited to

read the Appendix adopted by the Court of Appeals Sixth Circuit on August 4, 1976. (183a). The Detroit Board shudders to even think what will happen if the citizens of Detroit do not vote for the 5 mills. The Detroit system already having a \$68,000,000 operating debt which it is paying off will go over the brink into bankruptcy. This is a sad commentary for the fifth largest school district in the United States of America located in the wealthy, industrial State of Michigan.

In addition to this, the State of Michigan says that it will not even share in the cost of essential educational components needed as part of the desegregation process.

The issue is not simply who has the better comparative ability to pay the costs of desegregation. A constitutional violation has been shown; the State defendants were a substantial cause of the violation; they must therefore share in the cost of remedying the violation.

Based upon the facts of this case, the Constitution and the decisions of this Court, there has been no showing of a need for the exercise of this Court of its supervisory powers over the courts below and Certiorari should be denied.

III.

NO SIGNIFICANT QUESTIONS OF FEDERAL LAW HAVE BEEN RAISED IN THE PETITION.

There is nothing unprecedented about the decisions of the courts below. The courts below are not assuming any functions of controlling curriculum and regulating educational finance in school desegregation cases. All the courts below did is accept the testimony of the State defendants' own witnesses, buttressed by the testimony of plaintiffs' own witnesses and the Detroit Board witnesses, that educational components are essential to eradicate the effects of past unlawful segregation in Detroit and to implement a Detroit only desegregation plan.

These components cost money. The State defendants were found to have contributed to the cause of segregation in Detroit. As defendants they should share in the cost of desegregation. This is not a multi-district remedy but merely a reaffirmance of

what has long ago been established in the jurisprudence of this country, namely, that when two defendants have caused a wrong, then a court may require each of those defendants to share in the cost of remedying the wrong. This is all this case is about. A writ of certiorari should not be granted for such a simple, self-evident proposition.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the decisions of the Sixth Circuit rendered herein on August 4, 1976.

Respectfully submitted,

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DEC 30 1976

MICHAEL RODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. 76-447

**WILLIAM G. MILLIKEN, et al,
Petitioners,**

v.

**RONALD G. BRADLEY, et al,
Respondents.**

**On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit**

BRIEF OF PETITIONERS

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ARGUMENT

- I. IN THE ABSENCE OF ANY ADJUDICATED CONSTITUTIONAL VIOLATION WITH RESPECT TO EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ORDERING THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS IS BASED UPON AN ERRONEOUS LEGAL STANDARD THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT 17
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

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On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit

BRIEF OF PETITIONERS

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 540 F2d 229 and is reprinted in the Appendix to Petition for Writ of Certiorari at pp 151a-190a.^[1]

[1]

Hereafter, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the volume number and the page number, e.g., (A 12).

Record of the remedy hearings covering the period from April 29, 1975 to June 27, 1975, "R" followed by the volume number and the page number, e.g., (R I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

Other opinions delivered in the Courts below are:

**United States District Court for the Eastern District
of Michigan, Southern Division**

May 21, 1975, Order for Acquisition of Transportation, not reported. (PA 1a-2a).

August 14, 1976, Memorandum, Opinion and Remedial Decree (Findings of Fact and Conclusion of Law), 402 F Supp 1096. (PA 7a-88a).

August 15, 1975, Partial Judgment and Order, not reported. (PA 89a-101a).

November 4, 1975, Memorandum and Order [Desegregation Plan], 411 F Supp 943. (PA 103a-111a).

November 20, 1975, Order [Desegregation Plan], not reported. (PA 113a).

May 11, 1976, Memorandum, Order, and Judgment [Educational Components], not reported. (PA 115a-144a).

May 11, 1976, Judgment [Educational Components], not reported. (PA 145a-149a).

**United States Court of Appeals
for the Sixth Circuit**

June 19, 1975, Order [Acquisition of Transportation], 519 F2d 679. (PA 3a-6a).

August 4, 1976, Notice of Entry of Judgment, not reported. (PA 191a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 4, 1976. (PA 191a). The petition for writ of certiorari was filed on September 28, 1976, and was granted on November 15, 1976. The jurisdiction of the Court rests on 28 USC 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

United States Constitution:

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Whether, in the absence of any finding of a constitutional violation with respect to educational programs in the Detroit school system, the lower courts exceeded the limits of their authority in the remedy proceedings of this school desegregation case by ordering a system-wide expansion of existing educational programs in the Detroit schools?

II.

Whether, in the absence of any finding of a constitutional violation with respect to Michigan's system of financing public education, the lower courts' decisions compelling defendants in the executive branch of state government to pay out 5.8 million dollars, or more, in additional, unappropriated funds from the State Treasury to defray the costs of court ordered educational program expansion in the Detroit school system are contrary to the Constitution and the decisions of this Court?

STATEMENT OF THE CASE

In *Milliken v Bradley*, 418 US 717 (1974), reversing and remanding 484 F2d 215 (CA6, 1973), the Court answered in the negative the question of "whether a federal court may impose a multi-district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, [and] absent any finding that the included districts committed acts which effected segregation within the other districts" 418 US at 721.

In that opinion the Court defined the constitutional rights of the plaintiffs as follows:

"The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 US at 746

The Court concluded its opinion by saying:

"Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to *eliminating the segregation found to exist in Detroit city schools . . .*" (emphasis added) 418 US at 753

The segregation found to exist was the separation of pupils on the basis of race in the Detroit city schools. See, e.g., 418 US at 725-728.

Upon receipt of the Court's mandate from the Court of Appeals, the District Court^[2] ordered the plaintiffs and the Detroit Board to submit desegregation plans and ordered the State Board to submit a critique of the Detroit Board's plan.^[3] (PA 13a). The plan filed by the Detroit Board included 13 "edu-

[2]

Honorable Robert E. DeMascio to whom the case was assigned after the death of Honorable Stephen J. Roth on July 11, 1974. (PA 155a).

[3]

Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al," and individually by the title of their offices, i.e., "Governor," "State Board," etc.; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board," and the Detroit Federation of Teachers, Local 231, intervenor below, will be called "Federation." The other school districts that were parties to *Milliken v Bradley*, *supra*, were not parties to the proceedings "directed to eliminating the segregation found to exist in Detroit city schools" and are not parties to this appeal. (R I 5-6).

cational components" that carried a price tag of \$35,787,691.00. (Detroit Board's plan, p 15; State Board's critique, p 37). On May 6, 1975, during the course of the remedy hearings, the Detroit Board filed a revised desegregation plan carrying a total price tag for the "educational components" of \$29,764,891.00.^[4] In its plan, the Detroit Board of Education demanded that the money to defray the cost of the components (the expansion of existing educational programs) "must come from the State defendants", by the payment of funds in addition to moneys then appropriated, or to be appropriated in the future, as state school aid to the Detroit Board.

In its Memorandum Opinion and Remedial Decree of August 15, 1975, the District Court characterized the Detroit Board's plan as follows:

"The plan . . . contained many components that were vague or poorly documented. Costs for these components, including transportation, were excessive. The defendant Detroit Board sought to add 3,416 new employees, many at salaries well in excess of those paid to its more experienced and tenured teachers. Moreover, the plan failed to inform the court of the extent to which each of the components might presently exist in the school system. . . ." (PA 13a).

[4]

Three of the "educational components," in-service training, guidance and counseling and testing, involved in this appeal, were priced at an additional cost of \$15,730,301.00 in the Detroit Board's original desegregation plan and at an additional cost of \$11,713,047.00 in the Detroit Board's revised plan. The reading component ordered by the District Court in its May 11, 1976, Memorandum, Order and Judgment (PA 115a) and its May 11, 1976, Judgment (PA 145a) was not a part of the Detroit Board's plan, either original or revised, and thus carried no price in the Detroit Board's plan.

Plaintiffs' plan, dealing solely with pupil reassignment, did not contain any educational components. Plaintiffs' expert witness on school segregation and desegregation, who prepared the plan, testified that in his opinion the plan, if implemented, would comply with the Court's mandate to eliminate the segregation found to exist in Detroit city schools, *Milliken v Bradley*, *supra*, 418 US at 753. (A 58).

In its Memorandum Opinion and Remedial Decree of August 15, 1975, the District Court characterized plaintiffs' desegregation plan as follows:

"... The plan . . . deals solely with pupil reassignment. The rationale and the ultimate goal of the plan are that, as far as possible, every school within the district must reflect the racial ratio of the school district as a whole within the limits of 15 percentage points in either direction. . . ." (PA 24a).

Plaintiffs' plan was consistent, at least, with the theory of their complaint.^[5] As the Court noted in *Milliken v Bradley*, *supra*, 418 US at 723:

"... The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the

[5]

Although plaintiffs have filed with the District Court amended complaints alleging claims for multi-district relief, see *Bradley v Milliken*, 411 F Supp 937 (ED Mich, 1975), the original prayer for Detroit-only relief has never been amended. The Court's comment in *Milliken v Bradley*, *supra*, 418 US at 752 n 24, is particularly appropriate, *viz*: "Apparently, when the District Court, *sua sponte*, abruptly altered the theory of the case . . ., neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory."

implementation of a plan that would eliminate 'the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary, nonracial school system.'"

Hearings on the desegregation plans commenced on April 29, 1975 and concluded with the final arguments of counsel on June 26-27, 1975. During the course of the hearings, on motion of the plaintiffs, the District Court, on May 21, 1975, entered an order requiring Milliken, et al, at their cost, no later than May 28, 1975, to acquire 150 school buses "to be used in the Detroit Desegregation Plan to be implemented by order of the court." (PA 1a). On the appeal of Milliken, et al, the Court of Appeals modified the District Court's Order by requiring that the acquisition be made by the Detroit Board and that Milliken, et al, pay or reimburse the cost of acquisition to the extent of 75%.^[6] (PA 5a). The Detroit Board's petition for a writ of certiorari to review the Court of Appeal's Order was denied. 423 US 930 (1975).

On August 15, 1975, the District Court filed its Memorandum Opinion and Remedial Decree (PA 7a), and its Partial Judgment and Order (PA 89a). With respect to pupil reassignment, the District Court rejected the plans submitted by plaintiffs and

[6]

In that opinion, the Court of Appeals stated that the "modification is based upon the representations . . . made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan." (PA 4a). As the Court recognized in *Milliken v Bradley*, 418 US at 742 n 20, the plenary power to acquire transportation and to transport under Michigan law is vested in the local school district, i.e., the Detroit Board. Under the provisions of the state school aid act, 1972 PA 258, § 71, as amended by 1975 PA 261; MCLA 388.1171; MSA 15.1919(571), local school districts are reimbursed from legislative appropriations in an amount not to exceed 75% of the actual cost of transportation, including the acquisition of the motor vehicle.

the Detroit Board, and ordered the Detroit Board and its staff "in cooperation with the court's appointed experts" to prepare a revised desegregation plan, "which plan shall incorporate the guidelines contained in Section V 'Remedial Guidelines' of the court's Memorandum Opinion." (PA 89a).

Although expressly noting that the plan submitted by the Detroit Board did not distinguish between those components that were necessary to the successful implementation of a desegregation plan and those that were not (PA 35a), nevertheless, the District Court deemed it essential to mandate twelve of the thirteen components included in the Detroit Board's plan and added one of its own, comprehensive reading. (PA 36a-37a, PA 72a-83a).

Notwithstanding the affirmative holding that the Detroit schools were not *de jure* segregated with respect to faculty and staff, *Bradley v Milliken*, 338 F Supp 582, 589-591 (ED Mich, 1971) (Roth, J.), *aff'd* 484 F2d 215 (CA 6, 1973), the District Court in effect reserved its ruling on faculty reassignment, opining as to "the necessity of having a proper racial mix among the teaching staff of the school district." (PA 43a). By Order dated August 28, 1975, the District Court directed that "teachers in the Detroit School System shall be reassigned insofar as necessary . . . to achieve a distribution of not more than 70% of teachers of one race in each school." (PA 180a-181a). The Court of Appeals vacated the August 28, 1975 Order and remanded for the hearing of evidence on the issue of faculty assignment, but it affirmed the authority of the District Court "as an equitable remedy to order the reassignment of faculty." (PA 182a).

The District Court's Partial Judgment and Order of August 15, 1975 (PA 89a), was a parallel to its Memorandum Opinion and Remedial Decree. Insofar as it relates to this appeal, the

Partial Judgment and Order directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (PA 95a), and directed the Detroit Board to institute comprehensive programs for in-service training, counseling and career guidance, testing, (PA 95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (PA 92a).

Pursuant to the Partial Judgment and Order, the Detroit Board submitted a revised desegregation plan on September 19, 1975, and a revision thereof on October 21, 1975. (PA 104a). By a Memorandum and Order dated November 4, 1975, the District Court ordered the Detroit Board to implement the desegregation plan on or before the beginning of the winter semester, 1976. (PA 109a). By a Judgment entered on November 20, 1975, the District Court, inter alia, confirmed the November 4, 1975, Memorandum and Order. (PA 113a).

In broad outline, the plan adopted by the District Court required the reassignment of 27,524 students, of whom 21,853 would require bus transportation. The plan changed the racial balance in 105 schools out of approximately 300 zoned schools in the system (PA 161a). An additional 100 buses were ordered to be acquired and paid for on the same basis as the initial 150 buses. (Id). The desegregation plan was effectuated by the Detroit Board at the beginning of the second semester, January, 1976, without untoward incident. (PA 162a).

While the plan for school desegregation was processed the parties responded in compliance with the Partial Judgment and Order of August 15, 1975, by filing the requisite submissions with respect to those educational components that are the subject matter of this appeal, to wit: reading and communication skills, in-service training, testing, and

counseling and career guidance.^[7] At various times, the District Court entered orders approving the submissions and ordering their implementation.

On May 11, 1976, while appeals were pending in the Court of Appeals by plaintiffs, the Detroit Board and the intervenor Federation from the August 14, 1975, Partial Judgment and Order and other Orders subsequently entered based on the August 15, 1975 Memorandum Opinion (PA 7a), the District Court filed a Memorandum, Order, and Judgment (PA 115a) and entered "our final judgment in this matter." (PA 116a, 145a). Insofar as it relates to this appeal, the Judgment ordered into effect in the Detroit school system on or before the September, 1976 school term expanded "comprehensive programs for: a) Reading and communications skills, b) In-service training, c) Testing, [and] d) Counseling and career guidance," and ordered petitioners Milliken, et al, to defray one-half of the added cost of such expanded programs by the payment to the Detroit Board of additional, unappropriated funds from the State Treasury.^[8] (PA 146a-147a).

[7]

The reading and communication skills, in-service training and counseling and career guidance submissions were filed by the Detroit Board. The testing submission was a joint effort by the Detroit Board and the State Board. No hearings were held with respect to any of these submissions, or their implementation, except that the District Court conferred with counsel and other representatives of the parties on March 12, 1976. No stenographic record was made of that conference.

[8]

Although this appeal is concerned solely with these four so-called educational components, a fifth "component," vocational education centers, requires some explanation because of the District Court's reference thereto in the Memorandum, Order and Judgment of May 11, 1976. (PA 117a-119a). The District Court attempted to equate the vocational education centers with the four components. There is no relationship. For a number of years, the State Board has urged the Detroit Board to establish vocational education centers. The federal vocational education funds that the State Board agreed by its adopted motion and by stipula-

Pursuant to the Judgment (PA 146a-147a), the Detroit Board submitted to the State Board "it's highest budget allocated in any year for each of these above-enumerated quality education programs" and computed "the excess cost in addition thereto occasioned by the specific implementation of the [four] court-ordered programs." The highest budget allocated for each of the four components was in the 1975-76 school year and in that year the Detroit Board's budget allocations were as follows:

Reading	\$63,427,000
In-Service	715,000
Testing	1,440,000
Counseling	10,407,000
Total	<u>\$75,989,000</u>

tion to allocate to the Detroit Board were the funds available to the State Board for allocation on a 50% matching basis to school districts under state and federal law and the state plan for vocational education. See the Vocational Education Act of 1963; 77 Stat 403 *et seq.*, as amended; 20 USC 1241 *et seq.* These funds would have been available to the Detroit Board if it had gone forward with a plan for vocational education centers and had made application therefor. The Detroit Board had received substantial amounts of federal vocational education construction funds in the past when it had made application therefor.

The stipulation, paragraph 3 (PA 140a), expressly recites that state and federal statutes, rules and regulations will control the implementation of the Boards' adopted motions and that title to the centers, paragraph 5 (PA 140a), will be vested in the Detroit Board. In short, the vocational education centers are the antithesis of the four components. The establishment of the centers, pursuant to the stipulation is consistent with state laws, the plenary power of the Detroit Board and the deeply rooted tradition in public education of local control over the operation of schools. See *Milliken v Bradley*, *supra*, 418 US at 742-743. The cost of the centers is not being defrayed by additional, unappropriated state funds, but from federal funds allocable to the Detroit Board pursuant to law. And the establishment of the centers is an *educational* objective which the State Board, over many years, has urged the Detroit Board to undertake.

The "excess cost in addition thereto" was set forth as follows:

Reading	\$ 4,600,000
In-Service	2,454,000
Testing	539,000
Counseling	4,052,000 ^[9]
Total	<u>\$11,645,000</u>

Thus, the District Court ordered Milliken, et al, to pay to the Detroit Board unappropriated state funds in the amount of 5.8 million dollars in addition to the estimated 192.5 million dollars of appropriated funds (an increase of approximately 28.5 million dollars over 1975-76) that the Detroit Board will receive in state school aid in the 1976-77 school year. 1972 PA 258, as amended by 1976 PA 258; MCLA 388.1101 *et seq.*; MSA 15.1919 (501) *et seq.* See Affidavit [of Robert N. McKerr] in Support of Stay Motion, dated July 14, 1976, filed in the District Court on July 15, 1976, Docket Entry 911 (A I). The purpose of the payment is to defray one-half the cost of expanding, system-wide, components currently existing system-wide in the Detroit schools at an admitted expenditure in the amount of 75.9 million dollars.^[10] Further, the four compo-

[9]

In its plan for a comprehensive guidance and counseling program for grades K-12, dated September 30, 1975, filed with the District Court, the Detroit Board stated that elementary school counselors would be employed for the first time at an additional cost of approximately 4 million dollars. (September 30, 1975 Plan, p 13).

[10]

In the 1973-74 school year, the Detroit school district ranked 68th from the top in educational expenditures (current operating expenditures per pupil) among Michigan's 531 K-12 school districts. (MX 1, pp 32-33, R XXIX 151, R XXIX 153; R XXX 41). In that year in terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average of 25.59 mills. (MX 2, R XXIX 163-164). In the 1973-74 school year, the Detroit Board's

nents were finally ordered to be placed in effect some nine months after the desegregation plan for pupil reassignment had been implemented "in an orderly manner and in a spirit of community cooperation, without substantial disruption or disorder." (PA 162a). Finally, it should be noted that although the desegregation plan "changed the racial balance in 105 schools out of approximately 300 zoned schools" (PA 161a), the District Court's Judgment mandated *district-wide* expansion of the four components. (PA 146a-147a).

The Court of Appeals affirmed the District Court's ordering of the expansion of existing, system-wide components (PA 170a-171a), and affirmed "the judgment relating to the costs of the plan, but without prejudice to the *right* of the District Court to require a larger proportionate payment by the *State of Michigan* if found to be required by future developments." (emphasis supplied) (PA 180a). In effect, the Court of Appeals drew a sight draft on the treasury of the State of Michigan and affirmed the "right" of the District Court to fill in the amount.

On October 6, 1976, the Detroit Board filed the affidavit of its president saying that it would pay its one-half share (\$5.8 million) of the excess, additional cost of the expansion of the

general fund revenues exceeded its general fund expenditures by the amount of \$7.1 million and at the close of the year it had a general fund balance of \$11,574,906. (R XXV 10-12).

In the 1974-75 school year, the Detroit school district ranked 72nd from the top in educational expenditures (current operating expenditures per pupil) among Michigan's 530 K-12 school districts. Michigan Department of Education 1974-75 Bulletin 1012. In terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average levy of 26.15 mills. (State Board's Critique, p 46). The Detroit Board reported a \$16,415,747 general fund balance to the State Board as of the end of the 1974-75 school year. Annual School District Financial Report for the Fiscal Year Ended June 30, 1975.

four educational components.^[11,12] On October 18, 1976, the State Treasurer signed and transmitted to the Detroit Board a warrant, for which no moneys had been appropriated, drawn on the State Treasury in the sum of \$5,822,500 in compliance with the District Court's Judgment of May 11, 1976, as affirmed by the Court of Appeals. (PA 146a-147a; PA 170a-171a, 180a).^[13]

[11]

The affidavit was occasioned by the order of the District Court entered on August 3, 1976. By this order, the District Court denied the application for stay pending appeal of Milliken, et al, but the District Court also ruled "that payment by the state be triggered by the filing of an affidavit of the President of the Detroit Board of Education asserting that the Detroit Board is able to provide its share of the necessary funding." (Order, August 3, 1976, p 5). On October 15, 1976, the Court of Appeals granted Milliken, et al, a 15 day stay to allow them to seek a stay from the Supreme Court or a Justice thereof. On September 1, 1976, Mr. Justice Stewart denied the application of Milliken, et al, for a stay pending the filing of a petition for a writ of certiorari.

[12]

The Detroit Board on August 3, 1976, and on November 2, 1976, submitted to its electors a proposition to increase the constitutional limitations on taxes (Mich Const 1963, art 9, § 6) by 5 mills. The proposition was defeated at both elections.

[13]

There is another proceeding connected with this case now pending on appeal in the Court of Appeals. On April 29, 1976, the Detroit Board filed a petition in the District Court to restrain the acquisition by the Michigan Department of Corrections from the Salvation Army of a residence facility to be used as a community corrections center. The facility is located across the street from and about one-half block north of the Detroit Board's Cass Technical High School. After the Department of Corrections and the Salvation Army were added as parties by order of the court and after hearings during the month of May, 1976, on June 25, 1976, the District Court filed an opinion holding that the purchase and sale be enjoined on the grounds that the use of the facility by the Department of Corrections could affect the enrollment of Cass Technical High School and, therefore, could affect the desegregation of the Detroit schools. A permanent injunction was entered against the

SUMMARY OF ARGUMENT

Under the precedents of this Court, the scope of the remedy in school desegregation cases is determined by the nature and extent of the constitutional violation. Here, there has been no adjudicated constitutional violation with regard to the educational programs in the Detroit school system. Thus, the lower court orders compelling Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury to the Detroit Board, to pay one-half the cost of court ordered educational program expansions, should be reversed for the reason that they are not supported by any constitutional violation with regard to educational programs in the Detroit school system.

In this case, there has been no adjudication that Michigan's system of school financing is unconstitutional. The lower court orders compelling Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury contrary to Michigan law, are inconsistent with the sound principles of federalism enunciated by this Court that limit the power of the federal courts to enjoin state officials. The Tenth Amendment, as interpreted by this Court, precludes the federal courts from forcing their choices upon the states as to the conduct of integral governmental functions, including the appropriation of finite state tax dollars among competing demands from the myriad of governmental programs and services financed with state legislative appropriations. The Eleventh Amendment, as interpreted by this Court, bars the federal courts from compelling the payment of additional, unappropriated funds from the State Treasury.

purchase and sale on July 8, 1976. Milliken, et al, filed their notice of appeal on July 14, 1976 and their brief and the appendix were filed with the Court of Appeals on November 15, 1976. The Salvation Army has appealed also.

The lower court orders here under review threaten the legal, political and fiscal integrity of the states under our federal system of government set forth in the Constitution. Thus, this Court should reverse the decrees entered below ordering the payment of additional, unappropriated funds from the State Treasury to finance court ordered educational program expansions.

ARGUMENT

I.

IN THE ABSENCE OF ANY ADJUDICATED CONSTITUTIONAL VIOLATION WITH RESPECT TO EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ORDERING THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS IS BASED UPON AN ERRONEOUS LEGAL STANDARD THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

In affirming the District Court's order relating to the educational components here at issue and the financing of same, the Sixth Circuit Court of Appeals held:

" . . . We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportionate payment by the State of Michigan if found to be required by future developments." (PA 180a)

It is this judicially decreed blank check, to be filled in and drawn upon the Treasury of the State of Michigan to pay for court ordered educational program expansion, that is before this Court for review.

This Court enunciated the following legal standard in *Milliken v Bradley*, *supra*, 418 US, at 744:

"The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16. . . ."

In the instant cause, there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system. *Milliken v Bradley*, *supra*, 418 US, at 724-736.

Indeed, during oral argument in the remedial phase of this cause following remand by this Court, plaintiffs' counsel stated the following:

". . . The first thing we should say about the components is that under those circumstances do we, nor may this Court accept those components as a substitute for achieving the constitutional remedies required by the constitutional violations. The violations were not with respect to the absence of guidance counsellors, they were not with respect to the absence of certain testing components, they were not with respect to in-service training, they were not with respect to the absence of career education, or student rights, or school community relations. . . ." (R June 26, 1975, 131)

Plaintiffs' desegregation plan filed in the District Court dealt solely with pupil reassignment. Such plan did not contain any "educational components." (PA 24a) Moreover, plaintiffs' expert witness, who prepared their desegregation plan, testified that the plan eliminated the segregation found to exist in the Detroit city schools in conformity with this Court's prior remand of this cause. (A 58)

In the brief filed by plaintiffs in the Sixth Circuit, at p 5 n 6, the following appears:

"The district court has attached undue significance to ruling on matters *wholly unrelated* to desegregation of students and faculty in schools. See e.g. Memorandum and Order, July 3, 1975 (student code of conduct); Memorandum Opinion and Remedial Decree, August 16, 1975, at 99-119 ('educational components' of desegregation)." (emphasis added)

The reply brief filed in the Sixth Circuit by defendant, Detroit Board, the moving party behind the so-called "educational components," states, at p 6, that "it does not necessarily follow that since there has been no specific finding of a constitutional violation in the areas included in the educational components, therefore, these components are automatically excluded from a remedy designed to cure the constitutional violation of segregated schools." Thus, such Board admits the lack of any adjudicated constitutional violation as to the scope or content of the reading, in-service training, testing or guidance and counseling programs conducted by it in the Detroit school system.

Thus, it is beyond dispute that there are no constitutional violations with regard to educational programs in the Detroit school system. Further, as accurately stated by plaintiffs, Bradley, et al, on whose behalf the case was brought, the "educational components" are "wholly unrelated" to desegregation of pupils in Detroit's schools.

Nevertheless, the Sixth Circuit sustained the inclusion of the four components here at issue by affirming the trial court's purported finding of fact that the components are needed to remedy the effects of past segregation, to successfully desegregate and to help avoid resegregation. (PA 170a). This is

the same approach previously used by the lower courts in purporting to make factual findings that the Detroit school system could not be desegregated within Detroit. This Court properly reversed the lower courts on that issue, holding that they had employed an erroneous legal standard in seeking to achieve the racial balance they deemed desirable. *Milliken v Bradley, supra*, 418 US, at 739-747, 752-753. So here, the lower courts used an erroneous legal standard in compelling educational program expansions in the absence of any underlying constitutional violation with respect to such educational programs in the Detroit school system.

The Sixth Circuit cites only one case, *Brown v Board of Education*, 347 US 483 (1954), in support of its inclusion of expanded educational programs in the desegregation remedy herein. (PA 168a-172a). However, in *Brown v Board of Education*, 349 US 294, 300-301 (1955), dealing with remedy, there is no suggestion that system wide expansion of educational programs is to be a part of a school desegregation remedy.

Moreover, in the 22 years since *Brown, supra*, there have been hundreds of school desegregation remedies that have satisfied the requirements of the Constitution without the inclusion of so-called "educational components." In fact, the trial court in this cause ruled that "[t]here no longer is a denial of their right to equal protection when there are no schools from which they are excluded." (PA 62a).

As this Court noted in *Brown, supra*, 349 US, at 300, "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." More recently, in *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1, 23 (1971), this Court observed that "[o]ur objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on

account of race." With regard to the operation of schools, other than pupil reassignment, this Court stated that "normal administrative practice" should suffice. *Swann, supra*, 402 US, at 18-19.

Most recently, in *Pasadena City Board of Education v Spangler*, US; 96 S Ct 2697, 2705 (1976), this Court ruled as follows:

"... For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

Manifestly, the appropriate remedy for unlawful pupil assignment practices is pupil reassignment rather than court ordered expansion of existing educational programs. The prior decisions of this Court contain no intimation that schools cannot be desegregated without court ordered "educational components."

The judicial task is to correct the condition that offends the Constitution. *Swann, supra*, 402 US, at 16. Here, there is no condition that offends the Constitution with respect to the scope and content of educational programs in the Detroit school system. Thus, that portion of the unprecedented remedy ordered below dealing with expanded educational programs for in-service training, testing, reading and guidance and counseling is contrary to the decisions of this Court in *Brown, supra*; *Swann, supra*; *Milliken, supra*; and *Spangler, supra*.

The Sixth Circuit's inclusion of expanded educational programs in the remedy here is in conflict with the decision of the Tenth Circuit Court of Appeals in *Keyes v School District No 1, Denver, Colorado*, 521 F2d 465, 480-483 (CA10, 1975),

cert den, 423 US 1066 (1976). In that case, the Court vacated that portion of the trial court's order compelling the establishment of educational programs tailored to the needs of minority children, noting the lack of relationship between the constitutional violation, discriminatory pupil assignment, and the court ordered relief, establishment of educational programs.

In *Keyes, supra*, the specially concurring opinion of Judge Barrett contains the following sound language:

"There are no easy or quick solutions to many problems confronting our country. It is a serious mistake, in my judgment, to interject the federal judiciary in the operation, composition, management and control of the state school systems. It was never intended that such would be the case. The federal judiciary is not designed to operate and manage school systems. . . ." 521 F2d at p 490

The cases of *Hart v Community School District of Brooklyn, New York School District No 21*, 383 F Supp 699 (ED NY, 1974), *aff'd*, 512 F2d 37 (CA2, 1975), and *Morgan v Kerrigan*, 530 F2d 401 (CA1, 1976), *cert den*, US; 96 S Ct 2648, 2649 (1976), dealt with magnet schools having special programs to attract students as a part of pupil reassignment for desegregation. In contrast, here we have the court ordered expansion of existing educational programs on a system wide basis that far exceeds in scope the number of schools involved in pupil reassignment, without any prior finding of a violation in the scope and content of educational programs in the Detroit school system.

The question of whether to expand existing educational programs in the Detroit school system is reposed in the sound discretion of the Detroit Board, consistent with its available local, state and federal financial resources. *Milliken v Bradley, supra*, 418 US, at 742 n 20. Moreover, this Court has held that there is no constitutional right to any particular level of educa-

tional programming and funding of same in the public schools, noting that there is no consensus in this area that more is always better. *San Antonio Independent School District v Rodriguez*, 411 US 1, 43 (1973). Proposed changes in public education are important matters to be debated and acted upon by concerned citizens, parents, school officials and elected representatives in the democratic political processes rather than by the federal courts.

In summary, the unprecedented inclusion of expanded system wide educational programs in the remedial orders below, unsupported by any constitutional violation as to existing educational programs, is contrary to the decisions of this Court and other courts of appeals. The remedial orders below have placed the federal courts in the position of performing school board functions rather than judicial functions. Thus, this Court should reverse the decision below as to the four "educational components" here at issue.

II.

IN THE ABSENCE OF ANY FINDING OF A CONSTITUTIONAL VIOLATION WITH RESPECT TO MICHIGAN'S SYSTEM OF FINANCING PUBLIC EDUCATION, THE LOWER COURT'S UNPRECEDENTED DECISION COMPELLING DEFENDANTS IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PAY OUT 5.8 MILLION DOLLARS OR MORE IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY IS CONTRARY TO THE CONSTITUTION AND THE DECISIONS OF THIS COURT.

Assuming, *arguendo*, that the lower courts did not exceed their remedial authority in ordering the expansion of existing educational programs, the question still remains whether the lower courts may, consistent with the Constitution and the

decisions of this Court, compel defendants in the executive branch of state government to pay out 5.8 million dollars or more in additional, unappropriated funds from the State Treasury to defray the cost of such court ordered program expansion. It is objectionable for the courts to become the arbiters of curriculum in school desegregation cases within the limits of appropriated local and state funds. It is even more objectionable for the federal courts to also usurp the powers of state legislatures over appropriating state funds.

Each year the Detroit Board receives many millions of dollars in legislatively appropriated state school aid funds. In the 1976-1977 school fiscal year, the Detroit Board will receive approximately 192.5 million dollars in state school aid funds under the statutory allocation formulas enacted by the Michigan legislature in 1972 PA 258, as amended, *supra*. See, *supra*, p 13. Milliken, et al, have never objected to the use of such funds by the Detroit Board to pay the costs of operating a desegregated school system. Indeed, once the Sixth Circuit Court of Appeals modified the District Court's initial bus purchase order to be consistent with Michigan law, Milliken, et al, did not seek appellate review by this Court. (PA 1a-5a). The issue herein is whether the federal courts may compel the disbursement of millions of dollars in additional, unappropriated funds from the State Treasury for court ordered educational program expansions.

Again, at the threshold we are confronted with the reality that there has been no adjudication herein that the Michigan system of financing public education violates the Constitution under this Court's controlling decision in *Rodriguez, supra*. *Milliken v Bradley, supra*, 418 US, at 751-752.^[14] Thus, there

[14]

During the remedy hearings below, plaintiffs' counsel stated "... This, I repeat, is a desegregation case. It is not a school finance case" (R June 26, 1975, 8).

is no adjudicated violation in this case in the areas of educational programs or school finance that might justify the unprecedented financial relief ordered below against the State of Michigan and its treasury. (PA 180a).

The Sixth Circuit decision below cites no case law in which the federal courts have ordered officials in the executive branch of state government to pay out additional, unappropriated funds from the State Treasury for the cost of court ordered educational program expansion.^[15] (PA 172a-180a). This unprecedented expansion of the power of the federal courts over the states, their treasuries and the right of the people in each state to have their state tax dollars appropriated by their elected representatives should not come to pass under our federal system of government.

[15]

By way of illustrative example, the Court of Appeals cites *Scheuer v Rhodes*, 416 US 232, 238 (1974), a case in which this Court held that the Eleventh Amendment was not a bar to a civil action against state officers for money damages to be paid by the individual defendants rather than from the State Treasury. The Sixth Circuit also referred to *Cooper v Aaron*, 358 US 1 (1958), which involved the blatant disregard by state officers of a Supreme Court decision, a situation which has no relevance to the position of Milliken, et al. No court order has been, or will be, disobeyed. Moreover, *Cooper, supra*, did not in any way consider the power of a federal court to order payment of state funds in light of the Eleventh Amendment. The Court of Appeals relied heavily on *Wyatt v Aderholt*, 503 F2d 1305, 1318-1319 (CA5, 1974). However, a reading of that case reveals that no coercive relief was granted compelling the payment of funds from the State Treasury. In *Wright v Houston Independent School District*, 393 F Supp 1149 (SD Tex, 1975), the basic question was whether the local school district could be considered a state agency for Eleventh Amendment purposes.

- A. Established principles of federalism preclude the relief granted below compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury to the Detroit Board.

In *Rizzo v Goode*, 423 US 362 (1976), this Court reversed the lower court orders compelling the defendant city officials to implement internal procedures within the police department relating to the handling of citizen complaints against police officers. In doing so, this Court enunciated the sound principles of federalism that serve to limit the injunctive power of the federal courts over those in charge of state and local governmental agencies, as follows:

"Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. *We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.* Indeed, in the recent case of *Mayor v Educational Equality League*, 415 U.S. 605 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying '[t]here are also delicate issues of federal-state relationships underlying this case.' *Id.*, at 615."

423 US, at 380 (emphasis supplied)

In *Griffin v County School Board of Prince Edward County*, 377 US 218, 233 (1964), this Court ruled that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Thus, there this Court simply directed local officials to exercise their lawful powers under state law to levy local taxes to reopen the public schools free from racial discrimination.

Here, in contrast, the lower courts have ordered petitioners, Milliken, et al, to pay out additional, unappropriated funds from the State Treasury for court ordered program expansions in contravention of their lawful powers under state law. Under Michigan law, only the legislature may appropriate state funds. In Mich Const 1963, art 9, § 17, the people have provided that "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law." In Mich Const 1963, art 4, § 30, it is provided that "[t]he assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes."

With specific regard to state school aid to school districts, Mich Const 1963, art 9, § 11 provides as follows:

"There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems, as provided by law. One-half of all taxes imposed on retailers on taxable sales at retail of tangible personal property, and other tax revenues provided by law, shall be dedicated to this fund. *Payments from this fund shall*

be made in full on a scheduled basis, as provided by law."[16] (emphasis supplied)

The Address to the People accompanying Michigan Const 1963, art 9, § 11 reads as follows:

"This is a new section which directs the legislature to establish a School Aid Fund to which must be dedicated one-half of all state sales tax collections and such other revenues as the legislature may determine. Moneys in the fund must be used for support of education and school employees' retirement systems. *Payments from the fund are to be made in full on a basis scheduled by legislative enactment. . . .*" (emphasis supplied)

2 Official Record, 1961 Constitutional Convention, p 3400.

The appellate courts of Michigan have consistently ruled that, under Michigan law, only the legislature may appropriate state funds. *City of Jackson v Commissioner of Revenue*, 316 Mich 694, 719-720; 26 NW2d 569, 579 (1947), *Board of Education of the City of Detroit v Superintendent of Public Instruction*, 319 Mich 436, 456; 29 NW2d 902, 911 (1947). More recently, in *Regents of University of Michigan v Labor Mediation Board*, 18 Mich App 485, 490; 171 NW2d 477, 479, (1969), the Court stated that ". . . the legislature is the only body that has the power to appropriate the public funds of this state."

In *Rizzo, supra*, this Court held that principles of federalism precluded the federal courts from imposing internal proce-

[16]

The Michigan Supreme Court has held that the phrase "provided by law", as employed in the 1963 Michigan Constitution, means that the legislature is to do the entire job of implementation. *Beech Grove Investment Company v Civil Rights Commission*, 380 Mich 405, 418-419; 157 NW2d 213, 219 (1968).

dures upon a municipal police department even though, in that case, the defendants had the authority under state law to implement such procedures. Here, the lower federal courts have ordered Milliken, et al, to act beyond their authority under state law in disbursing millions of dollars in additional, unappropriated state funds to the Detroit Board. Such orders subvert Michigan's constitutional and statutory provisions reposing the appropriations power in the Michigan legislature. They are patently destructive of federal-state relations since such orders are in contravention of the constitution adopted by the people of Michigan and the appropriations statutes enacted by the elected representatives of the people of Michigan. In short, sound principles of federalism preclude the federal courts from usurping the authority of state legislatures to appropriate state funds.

B. The financial relief ordered below, compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury, is precluded by the Tenth Amendment as interpreted by this Court.

Recently this Court held, in *National League of Cities v Usery*, US; 96 S Ct 2465 (1976), that the power of the Congress under the Commerce Clause did not, because of the Tenth Amendment, extend to imposing minimum wage requirements on the states and their political subdivisions. In reaching that result, this Court noted the financial impact of such requirement on state governments and concluded its opinion with the following:

"But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v California*, simply wrong. Congress may

not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, 88 S. Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled."

..... US; 96 S Ct, at 2475-2476

In the specially concurring opinion of Judge Barrett in *Keyes, supra*, the following applicable language appears:

"... No one would contend that the federal judiciary is the body to allocate available state funds to the integrative objectives of the school systems in such a manner that it will decide the priority and amount of remaining funds for other necessary and proper state governmental functions. The Tenth Amendment did reserve to the people of the various sovereign states those powers not otherwise expressly delegated to the Federal Government."

521 F2d, at 490

Here, the Tenth Amendment is also a limitation on the power of the federal courts to force their choices upon the states as to the conduct of integral governmental functions, including

the appropriation of finite state tax dollars among competing demands from all levels of public education and the myriad of other governmental programs and services financed with state legislative appropriations. *Bradley v School Board of Richmond, Virginia*, 462 F2d 1058, 1068 (CA4, 1972), aff'd by equally divided court, 412 US 92 (1973). *National League of Cities v Usery, supra*.

C. The financial relief ordered below, compelling the disbursement of 5.8 million dollars in additional, unappropriated funds from the State Treasury, is precluded by the Eleventh Amendment as interpreted by this Court.

In *Edelman v Jordan*, 415 US 651, 663 (1974), this Court noted that "... the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment..." Here, the lower court orders at issue directly compel the payment of millions of dollars in additional, unappropriated funds from the State Treasury. Thus, under the precedents of this Court, the financial relief granted below should be reversed.^[17]

The evolution of the rule enunciated in *Edelman, supra*, can be traced through a number of prior decisions of this Court.

[17]

Here, unlike *Ex Parte Young*, 209 US 123 (1908), the relief is not directed to enjoining a state officer from enforcing an unconstitutional statute. There has been no ruling in this case that any Michigan statute dealing with the financing of public schools is unconstitutional. Absent such a ruling, *Ex Parte Young, supra*, is inapplicable. *Worcester County Trust Company v Riley*, 302 US 292, 300 (1937). Also, unlike *Fitzpatrick v Bitzer*, US; 96 S Ct 2666 (1976), here there is no congressional legislation authorizing the federal courts to grant relief compelling the payment of additional, unappropriated funds from the State Treasury for court ordered educational program expansion in school desegregation cases.

In *Louisiana v Jumel*, 107 US 711 (1883), bondholders sued to obtain payment of principal and interest on their bonds. This Court, although acknowledging that Louisiana had violated its contract with the bondholders, nevertheless denied relief, holding that:

“... The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. . . . But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.”

107 US, at pp 727-728

In *Hans v Louisiana*, 134 US 1 (1890), a citizen of Louisiana brought suit to compel payment on bonds issued by the State of Louisiana. In affirming dismissal of the case, this Court ruled that:

“It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed

by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.”

134 US, at p 21

Here, contrary to the above quoted language of this Court, the lower federal courts have substituted their judgment for that of the Michigan legislature in determining the level of appropriations from the State Treasury to the Detroit Board.

This Court, in *Great Northern Life Insurance Co v Read, Insurance Commissioner*, 322 US 47 (1944), dismissed, for lack of jurisdiction, a suit to recover taxes paid to the State of Oklahoma. In doing so, the Court observed that “. . . when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.” 322 US, at p 54. In the instant cause, the lower courts have clearly invaded “the sovereign exemption from judicial interference in the vital field of financial administration” by compelling the payment of millions of dollars in additional, unappropriated funds from the State Treasury.

In *Ford Motor Co v Department of Treasury of Indiana*, 323 US 459, 464 (1945), this Court held that “. . . when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. . . .” So here, the immunity granted the State of Michigan under the Eleventh Amendment and the decisions of this Court precludes the lower court orders compelling payment of moneys from the State Treasury.

In *Edelman, supra*, this Court held that the Eleventh Amendment precluded the federal courts from ordering the payment of welfare benefits from the State Treasury even though such benefits had been wrongfully withheld. In reaching that result, the Court noted, 415 US, at p 667 n 12, that *Griffin, supra*, involved an order directed to county officials that did not fall within the ambit of the Eleventh Amendment’s jurisdictional bar.

In this case, the decree sought to be reviewed does not direct state officials to alter their previous course of conduct, in compliance with a substantive federal-question determination concerning pupil assignment in the Detroit schools, with an ancillary effect on the State Treasury. Rather, the decree sought to be reviewed directly commands “the State of Michigan” to pay out millions of dollars in additional, unappropriated state funds for court ordered program expansion, to remedy the claimed effects of its alleged prior wrongdoing with regard to pupil assignment. (PA 170a, 178a, 180a). It is, in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials. Therefore, such decree is precluded under this Court’s holding in *Edelman, supra*, 415 US, at 668.

The reference below to “the normal share of State school aid funds provided to Detroit” is misplaced. (PA 178a). There

is no normal share of state aid funds provided Detroit, but only the amount each year which the Detroit school system is entitled to receive based upon the statutory appropriation and allocation formulas enacted by the legislature in 1972 PA 258, as amended, *supra*. Further, at what point, if ever, will the Michigan legislature have appropriated sufficient funds to the Detroit school system to satisfy the lower courts view of sound educational and fiscal policy so that additional, unappropriated funds will not have to be disbursed to such school system pursuant to the orders of the lower federal courts? (PA 180a).

The orders below have a most detrimental effect on the fiscal integrity of the State of Michigan. For the 1976-1977 state fiscal year, the most recent estimate provided the Michigan legislature by the Michigan Budget Director is that the state’s general fund balance, as of the close of such fiscal year, will be a deficit of 140.3 million dollars. This estimate includes, as an expenditure, the 5.8 million dollars in additional, unappropriated funds paid by the State Treasurer to the Detroit Board on October 18, 1976, as a result of the lower court orders here under review.

Clearly, the decisions below have superimposed upon this already strained state fiscal situation the expenditure of 5.8 million dollars in additional, unappropriated funds. Thus, it will be more difficult to attempt to balance the state’s general fund pursuant to Mich Const 1963, art 5, § 20.^[18] In making

[18]

“No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes.”

reductions in expenditures authorized by appropriations, should the Governor and the legislative appropriations committees make reductions in social services, mental health or corrections appropriations to offset the judicially decreed expenditure of an additional 5.8 million dollars in unappropriated state funds to the Detroit school system? This result, we submit, is what the Eleventh Amendment was intended to preclude.

The Detroit Board recently submitted its balanced budget to the Michigan Department of Education for the 1976-1977 school fiscal year. Such budget reveals that the Detroit Board finished the 1975-1976 school fiscal year with a general fund equity surplus of 7.4 million dollars and that its projected expenditures for 1976-1977 were 398.6 million dollars. Thus, it is readily apparent that, contrary to the self-serving portrayal of economic deprivation submitted below by the Detroit Board and adopted by the Sixth Circuit, the Detroit school system has been financially sound in recent years even though its local tax effort for school operating purposes has been below the statewide average. In this regard, see, *supra*, p 13 n 10.

Michigan's system of financing public education includes both local property tax revenues and legislative appropriations of state school aid funds to school districts. Mich Const 1963, art 9, §§ 6 and 11. Michigan has adopted a modified district power equalizing system of school finance which encourages and rewards local tax effort by guaranteeing a fixed level of funding per pupil in combined state and local funds for each mill of school operating property taxes levied at the local level. See section 21 of 1972 PA 258, as amended, *supra*.

In *Rodriguez, supra*, 411 US, at 40-44, 49-55, this Court sustained the validity of the Texas system of financing public education, ruling that matters of state fiscal and educational policy are best determined at the state or local level under our federal system. There, this Court held that reliance on variable

local school district property taxes for financing public education furthered the legitimate purpose of local control of education consistent with the Equal Protection Clause.

Here, as in *Rodriguez, supra*, we have a system of financing public education based upon a combination of local property tax revenues and legislative appropriations of state school aid. In Michigan the state school aid statute is designed to encourage and reward local tax effort for public education. As long as the prospect of increased state funding for the Detroit Board by federal court order looms large, the voters in Detroit will lack incentive to approve property tax increases for school operating purposes. See, *supra*, p 15 n 12. Further, Michigan's statewide system of financing public education will be disrupted, contrary to the decision of this Court in *Rodriguez, supra*.

In summary, the lower courts have assumed the role of the Michigan legislature in ordering Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from the State Treasury to pay the cost of court ordered educational program expansion in the Detroit school system. This, we submit, is contrary to the decisions of this Court in *Edelman, supra*, and *Rodriguez, supra*.

III.

CONCLUSION

The orders entered below, compelling the payment of 5.8 million dollars in additional, unappropriated funds from the State Treasury for court ordered educational program expansion this year, threaten the legal, political and fiscal integrity of the states under our federal system of government set forth in the Constitution. Further, pursuant to the orders entered

below, additional payments will be made in subsequent years in amounts to be determined by the District Court pursuant to the blank check issued by the Court of Appeals. (PA 180a). Unless the states are to become mere appendages of the federal judiciary in the conduct of state and local governmental affairs, such orders should be reversed by this Court.

Previously in this case, the lower courts approved an unprecedented multi-district remedy to "produce the racial balance which they perceived as desirable," and earned reversal by this Court. *Milliken v Bradley, supra*, 418 US, at 740. In the orders presently under review, the lower courts have become the educational and financial arbiters of curriculum and school finance for the Detroit school system and the State of Michigan to produce the educational and financial results which they perceive as desirable. As in *Milliken v Bradley, supra*, this Court should reverse the unprecedented decision below.

Wherefore, petitioners Milliken, et al, respectfully request that this Court reverse the opinion and judgment of the Sixth Circuit Court of Appeals insofar as such opinion and judgment compel Milliken, et al, to disburse additional, unappropriated

funds from the State Treasury to the Detroit Board to pay for the cost of court ordered educational program expansion in the Detroit school system.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, *et al.*,
Petitioners,

—v.—

RONALD BRADLEY, *et al.*,
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BRIEF FOR BRADLEY RESPONDENTS

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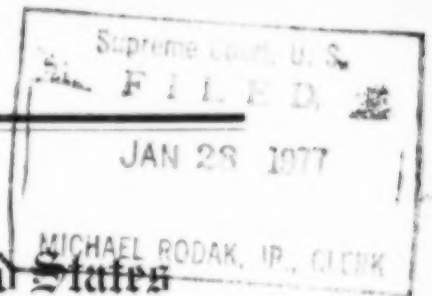


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IN THE
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OCTOBER TERM, 1976

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WILLIAM G. MILLIKEN, *et al.*,
Petitioners,

—v.—

RONALD BRADLEY, *et al.*,
Respondents.

BRIEF FOR BRADLEY RESPONDENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Given the *de jure* segregation of the Detroit Public Schools, did the courts below have the equitable authority to include such ancillary administrative and educational relief in the desegregation remedy as was shown necessary to begin to eliminate the continuing effects of the segregation violation and to assure the transition to and maintenance of a racially non-discriminatory school district?

2. Do constitutional principles of federalism, the tenth amendment, or the eleventh amendment shield State defendants, who have previously been adjudicated to have contributed substantially to the *de jure* segregation of the Detroit Public Schools, from participating generally in implementing appropriate ancillary relief?

3. Does the eleventh amendment particularly bar the State defendants from sharing in the fiscal consequences of implementing such prospective relief?

4. Assuming *arguendo* the equitable authority and constitutional power, did the courts below properly exercise their equitable discretion in ordering such relief against State defendants in the particular circumstances of this case?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations involved are reprinted in Appendix B attached hereto. They include the tenth, eleventh, and fourteenth amendments to the Constitution; 20 U.S.C. §§ 1601 and 1606(a); 20 U.S.C. §§ 1702(b), 1703(a), (b), (f), 1706, 1708, 1720(a); 28 U.S.C. §§ 1331, 1343 (3) and (4); 42 U.S.C. § 1983; 42 U.S.C. §§ 2000c-2 and c-4; 45 C.F.R. §§ 180.12, .31, .41; 45 C.F.R. §§ 185.01 and .12.

STATEMENT OF THE CASE

A. Introduction

As this Court knows, the Detroit school case has not heretofore been marked by procedural simplicity nor general agreement on the controlling constitutional or equitable principles. See, e.g., *Bradley v. Milliken*, 484 F.2d 215 (6th Cir., 1973) (*en banc*), *rev'd in part sub nom. Milliken v. Bradley*, 484 U.S. 717 (1974) (opinion of Burger, C.J., for the Court), 753 (Stewart, J., separate concurring opinion), 757 (Douglas, J., dissenting), 762 (White, J., dissenting), 781 (Marshall, J., dissenting). The remedial proceedings in the district court following this Court's remand in *Milliken* for elimination of the *de jure* segregation within the Detroit Public Schools can only be characterized as procedurally flawed and, in sev-

eral respects, substantively bizarre. Fortunately, the Court of Appeals, despite its express misgivings with the limitations set in *Milliken* (PA 5a-6a and 151a-152a, 158a n. 3), has acted to reverse the substantive errors and has remanded for further proceedings (PA 182a).*

Among the numerous parties, only the State defendants have petitioned this Court to review any portion of the judgment of the Court of Appeals, and then only with respect to the requirement that they pay a share of the costs of four aspects of desegregation relief ancillary to pupil reassignments. Without unduly belaboring the prior history and record in this cause, we believe that a review of the case will show that the State Petitioners present considerably narrower equitable and constitutional issues than their rhetoric would admit.

Moreover, such review will provide grounds for this Court to find substantial, if not unanimous, agreement with the judgment of the Court of Appeals, without reaching the monumental constitutional issues expressly left open in *Ex parte Young*, *Edelman v. Jordan*, *National League of Cities v. Usery*, *Fitzpatrick v. Bitzer*, and *Mt. Healthy City School District v. Doyle*. Notwithstanding the representations of State Petitioners and their *amici curiae* friends, this is not the case for the Court to decide either to rend or to mend the very fabric

* The opinions and orders contained in the Appendix to the Petition for Certiorari will be cited in the form, for example, PA 151a; reference to prior opinions will be to the official reports, e.g., 484 F.2d 215 or 418 U.S. 717. Reference to record materials contained in the joint appendix will be in the form A 53. Reference to other record evidence will be in the following form: e.g., VPX 3 and 22 VTr 2506 for plaintiffs' exhibit 3 and volume 22, page 2506, of the transcribed testimony from the 1972 violation hearings; MTr 35 and MSX 5 for page 35 of the transcribed testimony and State defendants' exhibit 5 from the 1973 remedy hearings on Detroit-only and metropolitan plans; and RTr 5/20/75 at 65 for page 65 of the testimony transcribed on May 20, 1975, during the 1975 remedy hearings on remand from *Milliken*.

of the Constitutional Union with respect to the claim of State sovereignty. To put the point somewhat differently, a review of the prior proceedings will show that this is not the case by which to determine under our Constitution whether "the States [have been denigrated] to a role comparable to the departments of France" relative to the enumerated National powers, *Elrod v. Burns*, 49 L.Ed.2d 547, 567 (1976) (Burger, C.J., dissenting), or whether the States have recently been promoted to sovereignty virtually as complete as that of France itself, even on matters specifically delegated by the Constitution to the previously supreme authority of the Federal government. See *National League of Cities v. Usery*, 49 L.Ed.2d 295, 260-74 (Brennan, J., dissenting).

B. The Pre-Milliken Proceedings

Plaintiffs Ronald Bradley, et al., Detroit school children and their parents, filed their Complaint on August 18, 1970, against the Superintendent and Board members of the Detroit Public Schools and against the State Board of Education, Superintendent of Public Instruction, Attorney General, and Governor.¹ Plaintiffs alleged that defendants and their predecessors in office acted with the purpose and effect to foster and to maintain a *de jure* segregated public school system and denied plaintiffs equal educational opportunities along racial lines. Plaintiffs prayed for complete relief from these unconstitutional practices including, *inter alia*, complete desegregation; elimination of the racial identity of every school in all respects; maintenance now and hereafter of a unitary, racially non-discriminatory school system; and such

¹ Prior to the evidentiary hearings on violation, the Detroit Federation of Teachers and a white citizens' group intervened as parties defendant. During the remedial hearings following the violation findings, the Treasurer of the State of Michigan was joined as a party defendant and various suburban school districts were permitted to intervene as parties defendant.

further relief as would appear to the district court to be equitable and just. See Complaint.

During preliminary proceedings and appeals, portions of Act 48 of Michigan Public Acts of 1970 were declared unconstitutional because they obstructed and nullified a partial, voluntary high school desegregation plan adopted by the Detroit Board and "had as their purpose and effect the maintenance of segregation." 343 F. Supp. 582, 589 (1972); 433 F.2d 897 (1970). Upon direction from the Court of Appeals, 438 F.2d 945 (1971), evidentiary hearings on the merits began in the district court on April 6, 1971, and continued for forty-one trial days through July 22, 1971. Plaintiffs introduced substantial evidence to show not only the pervasive and long-standing *de jure* segregation of pupils, but also racial discrimination in other aspects of schooling, including faculty and staff assignment and the allocation of educational resources. Plaintiffs also introduced substantial evidence of the harmful consequences of all these racially discriminatory practices and conditions on the educational opportunities currently enjoyed by black pupils.²

² See, e.g., VPX 3 at 72-134, VPX 107 at 294-98, VPX 177-78, VPX 154C, VPX 161-66, VJXFFFF, 15 VTr 1611-21, 16 VTr 1805-10, 20 VTr 2180-86, 22 VTr 2506-18, 38 Tr. 4340 (faculty and staff segregation); 8-9 VTr *passim*, 16 VTr 1779-91, 37 VTr 4148-56, 41 VTr 4665-66, 41 VTr 4677-78, VPX 107 at 298, VPX 134, VPX 161-64, VDX NNN (allocation of educational resources and opportunities along racial lines and harmful effects of segregated schooling on the pupils). In summary, plaintiffs' proof showed that the racial composition of faculty and staff still mirrored the racial composition of student bodies; through 1955 the Detroit Board never assigned black teachers to majority white schools; and through 1965, the Board assigned black teachers to predominantly white schools only if acceptable to that particular school community. Plaintiffs' proof also showed that educational resources were allocated in a pattern of "systematic differentiation paralleling racial lines" 41 VTr 4665-66. Thus, for example, substantially more emergency substitutes and inexperienced teachers were assigned to black schools than to white; and the average teacher salary in black schools was \$1,400 to \$1,800 less than in white schools, VPX 161-64. Finally, plain-

On September 27, 1971, the district court, Hon. Stephen J. Roth sitting, issued its opinion on violation. 338 F. Supp. 582. The court found that both State and local defendants, as well as the State of Michigan, acted directly, jointly and severally through a variety of traditional segregation practices "with a purpose of segregation" to create and to aggravate the then current condition of almost total segregation of pupils. 338 F. Supp. at 587-89, 592. The district court, however, rejected the similar allegations and evidence with respect to faculty and staff assignments, 338 F. Supp. at 589-91, and made no findings with respect to the proof of racial discrimination in the allocation of educational resources and opportunities and the harmful effects on the pupils of the *de jure* segregation. On October 4, and November 5, 1971, the court ordered the State and local defendants to submit Detroit-only and area-wide plans to remedy the *de jure* segregation found.³

At the evidentiary hearings in March and April, 1972, on the Detroit-only and area-wide plans, the district court received substantial evidence from *all* parties on the need for relief ancillary to pupil desegregation. The evidence on such ancillary relief supported, *inter alia*, faculty and staff desegregation; elimination of racial discrimination

tiffs proof showed the harmful and stigmatizing consequences of the pervasive racial discrimination on "the hearts and minds" (*Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954)) of the pupils and the educational opportunities of black pupils, including particularly with respect to reading. *E.g.*, 8 VTr 863-86, 895, 920-21, 935-40, 950-69; 9 VTr 960; VPX 134.

³ The Detroit Board and State defendants filed notices of appeal from this order and the violation opinion. Plaintiffs filed a protective cross-appeal and a motion to dismiss these appeals because the order and opinion were not "final," adjudicated no substantial rights of the parties, and represented no "judgment" from which to permit appellate review. On February 23, 1972, the Court of Appeals dismissed the appeals because there was "no final order from which an appeal may be taken." 468 F.2d 902, 903, *cert. denied*, 409 U.S. 844.

in school facilities and other educational resources; elimination of racial discrimination from curriculum, tests, programs, and counseling services; multi-racial and remedial curriculum; and in-service training for faculty and other staff. No party, including State defendants, presented any contrary evidence on the need for such ancillary relief as a part of implementing desegregation relief.⁴

In its June 14, 1972, opinion in support of "Ruling on Desegregation Area and Development of Plans" requiring area-wide relief extending beyond the Detroit School District, the district court made findings concerning the harmful consequences of *de jure* segregation on the school children and the need for restructuring facilities and reassigning staff incident to pupil reassignment, 345 F. Supp. 914, 921, 931-33. The court entered appropriate school equalization and staff desegregation orders "so as to prevent the creation or continuation of [racial] identification of schools by reference to past racial composition." 345 F. Supp. at 919. Citing the "uncontroverted evidence" received, the court also found that the "following additional factors are essential to implementation and operation of an effective plan of desegregation," including, *inter alia*, multi-racial and other curriculum reforms, in-service training for faculty and staff, and nondiscriminatory testing and counseling designed to overcome the effects of *de jure* segregation and residual racial discrimination. 345 F. Supp. at 935-36. In its order, the court included specific provisions for such ancillary relief "to insure the effective desegregation of the schools . . ." 345 F. Supp. at 919.

⁴ See, e.g., MTr 35-36, 312, 353, 404-07, 470-71, 495-96, 586-87, 782, 1342-43; MSX 5, 8, 10; MPX 2. Some of the added suburban defendants, and one of the State Board plans (MSX 8), however, proposed equalizing education opportunities as an adequate substitute for pupil desegregation. See 345 F. Supp. 914, 921 n.1.

Subsequently, on July 20, 1972, the district court made these rulings and orders final pursuant to Rule 54(b), FED. R. CIV. P., and appealable pursuant to 28 U.S.C. § 1292(b). The State, Detroit Board, and intervening suburban school district defendants appealed.⁵ These appeals focused on the *de jure* segregation violation findings and the propriety of the area-wide pupil desegregation relief ordered. The Court of Appeals, sitting *en banc*, basically affirmed the judgment of the district court but vacated and remanded to provide all potentially affected suburban school districts with the opportunity to be heard. 484 F.2d 215 (1973).

The State and intervening suburban school district defendants petitioned this Court to review the violation findings against the State defendants and/or the propriety of ordering area-wide relief based upon findings of *de jure* segregation within the Detroit School District. Upon reviewing the judgment of the Court of Appeals, this Court, on July 25, 1974, reversed that portion of the judgment permitting inter-district relief based on violation findings that State and Detroit defendants caused *de jure* segregation within the Detroit School Dis-

⁵ Plaintiffs did not cross-appeal because the "final" order granting relief (in contrast to some of the particular findings and reasoning) provided *all* relief prayed for in their initial complaint and supported by their evidence: pupil desegregation, faculty and staff desegregation, and other ancillary relief designed to overcome the harmful effects of *de jure* segregation on the children, to avoid racially discriminatory provision of education opportunities, and otherwise to assure the effective transition to and maintenance of a unitary, racially non-discriminatory school system. Being a prevailing party entirely satisfied with the "final" judgment, plaintiffs could not appeal to review findings of fact or interim rulings they did not like, *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934), and did not need to appeal to preserve their right to argue *any* ground in support of the judgment. *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970); *Langnes v. Green*, 282 U.S. 531, 535-59 (1931); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). See generally, Stern, *When to Cross-Appeal or Cross-Petition*, 87 HARV. L. REV. 763 (1974).

trict, 418 U.S. at 745-53; provided guidelines for and examples of area-wide and boundary violations necessary to support interdistrict relief, 418 U.S. at 744-45; and remanded for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit City schools," 418 U.S. at 753.

C. The Post-Milliken Proceedings in the District Court

The State Petitioners suggest (Brief at 18-19) that plaintiffs and their experts either opposed or did not support, in the courts below, the ancillary relief here at issue. This misrepresents plaintiffs' position in the courts below and the testimony of their experts in the district court. It also misconceives the dynamics of the remand proceedings following *Milliken*. For throughout the remand proceedings, plaintiffs and their experts supported such ancillary relief as a proper adjunct to the primary relief of actual pupil desegregation where necessary to remedy the continuing harm resulting from the segregation violation and to insure the transition to and maintenance of a racially non-discriminatory system of schooling. Plaintiffs, however, were repeatedly forced to focus the attention of the defendants and the district court on the primary desegregation remedy lest it be limited by the apparent preoccupation with ancillary relief and related financial concerns. Only with this understanding of the context may the remand proceedings be fairly understood.

Following the death of District Judge Roth on July 11, 1974, the case was assigned to District Judge Robert E. DeMascio for remand proceedings consistent with *Milliken*. Pursuant to the district court's order, the Detroit Board and plaintiffs submitted pupil reassignment plans in Spring, 1975.⁶ The Detroit Board plan operated

⁶ On April 16, 1975, the district court "granted the motions to dismiss filed by the intervening suburban defendants and simultaneously granted plaintiffs' motion to amend their complaint to in-

on the novel premise that only identifiably white schools need be "desegregated," thus proposing to maintain over 100 *de jure* segregated, all-black schools. The Detroit Board plan also included extensive discussion, without documentation but with "excessive" (PA 13a) cost estimates, of purportedly necessary ancillary relief.

On April 20, 1975, the State defendants submitted a "critique" of the Detroit Board's plan which queried whether any ancillary relief was appropriate but conceded that several aspects of the proposed relief (including in-service training of staff and non-discriminatory guidance, counseling, and curriculum) "deserve special emphasis in connection with implementation of a desegregation plan." *Critique* at 39, 50. Evidentiary hearings on the plans submitted and ancillary relief continued from April 29 through June 27, 1975.⁷ Substantial evi-

clude allegations of inter-district *de jure* violations." PA 13a. Subsequently, plaintiffs filed their second amended complaint alleging general causes of action for inter-district relief under *Milliken*. Proceedings on a more definite, third amended complaint have been stayed pending conclusion of the remand proceedings on Detroit-only remedy and of a cost dispute between the parties. See 411 F. Supp. 937; PA 168a.

⁷ During these hearings, plaintiffs moved the court to order acquisition of 150 school buses, the minimum number necessary to implement either pupil reassignment plan. By order of May 21, 1975, the district court ordered the State defendants to acquire the buses. PA 1a-2a. On expedited appeal, the Court of Appeals affirmed this order with the modification that the Detroit Board acquire the buses, with the State defendants to bear 75% of the cost. PA 3a-5a, 519 F.2d 679, *cert. denied*, 423 U.S. 930 (1975). This modification was made pursuant to State defendants' representations of their willingness to conform to that procedure consistent with State practice. PA 4a. The district court subsequently followed this modified procedure and formula for sharing the costs in ordering the acquisition of 100 additional school buses. PA 161a n.4. It should also be noted, however, that the Court of Appeals specifically directed that State defendants take all necessary steps, including utilizing existing funds already allocated, or to be allocated, and reallocating existing or new funds, to pay or reimburse the State's share of such transportation acquisition. PA 5a. The

dence was introduced showing the real need for the ancillary relief here at issue—in-service training of staff, non-discriminatory testing, guidance and counseling, and remedial reading—to eliminate the continuing effects of the *de jure* segregation and discrimination and to insure the effective transition to non-discriminatory schooling. See, e.g., A 7-9, 30-42, 51-61, 67-68, 72-82, 86-89; RTr 5/8/75 at 24, 66, 95-100; RTr 5/9/75 at 61-62, 72-75; RTr 5/15/75 at 42-49; RTr 5/20/75 at 127; RTr 6/12/75 at 116-17.⁸

On August 15, 1975, the district judge issued his opinion on remedy. He held that ancillary relief was appropriate and would be ordered only to the extent necessary to overcome the continuing, harmful effects of the violation, to remedy continuing racial discrimination in educational opportunities, or to insure the successful implementation of a non-discriminatory plan of pupil desegregation (PA 13a, 35a-37a, 55a, 64a-74a, 78a-79a, 81a-82a). However, the district judge rejected the constitutional requirement that the plan of pupil reassignments must itself eliminate the primary pupil segregation vio-

State defendants concede the propriety of their sharing in these costs, did not seek review from these orders, and do not ask this Court to review these orders as part of this appeal. See State Petitioners' Brief at 8 and n.6.

⁸ The State Petitioners' suggestion (Brief at 18) that plaintiffs' experts were of the opinion that no ancillary relief was necessary to remedy the *de jure* pupil segregation is incredible. The testimony of Drs. Foster and Stolee, only some of which is cited above, was that the four aspects of ancillary relief here at issue were essential to an effective pupil desegregation remedy and were regularly included by school districts throughout the country as necessary components in implementing pupil desegregation plans. As the former and current directors of the University of Miami Title IV School Desegregation Center, they had personal knowledge of these facts; for they have assisted literally hundreds of school districts in implementing pupil desegregation plans pursuant to their mandates from Congress and HEW, and federal funding. See, e.g., 42 U.S.C. § 2000c-4(a), 20 U.S.C. § 1606(a), and 45 C.F.R. § 185.

lation found. Thus, the district court adopted the thesis that only racially identifiable white schools need be eliminated, and rejected even the Detroit Board's limiting pupil reassignment plan because it accomplished too much desegregation (PA 51a-52a, 61a). The district court simultaneously issued a Partial Judgment and Order denying the relief requested in plaintiffs' pupil desegregation plan and establishing guidelines and a timetable for further planning and submission of a revised plan by the Detroit Board.⁹

Plaintiffs filed their notice of appeal, a stay application, and a motion seeking summary reversal of the district court's rejection of their plan. Plaintiffs particularly challenged the premise that pupil reassignments need not be extended to black schools, which thereby excluded from desegregation over 100 all-black schools in the three administrative regions of the school district at

⁹ The district judge in his August 15, 1975, opinion and appendices noted that he had proceeded *ex parte* and entirely outside the record with meetings and communications with defendant parties, court experts, and non-parties to make specific fact findings and to marshal support throughout the State for "his plan" prior to its entry. See, e.g., Appendices A-C to the district court's August 15, 1975, opinion and PA 13a, 15a, 50a-51a. After the August 15, 1975, opinion, the district judge's non-judicial conduct became, if anything, even more openly the rule than the exception. These extraordinary *ex parte* contacts with the defendants and non-parties were rationalized by the district court as "reflect[ing] the fact that the adversarial phase of this litigation has ended" (PA 116a n.2), despite plaintiffs' specific request for a hearing to present evidence on their objections to the revised plans submitted by the Detroit Board pursuant to the August 15 guidelines. (Plaintiffs have pending a motion to recuse the district judge for cause under 28 U.S.C. § 455(a) because, *inter alia*, of such repeated violations of Canon 3A of the ABA Code of Judicial Conduct.)

[Note: After the preparation of this brief for the printer, the district judge, on January 21, 1977, entered an order denying plaintiffs' motion to recuse, except with respect to further proceedings on the faculty segregation issue; on that issue, the district judge referred questions about his impartiality for decision by the Chief Judge of the Eastern District of Michigan.]

the very heart of the *de jure* violation. These matters were taken under advisement by the Court of Appeals and a briefing schedule set on all appeals.¹⁰

On October 16 and October 29, the district court issued orders concerning a monitoring commission to be implemented by State defendants and a uniform code of student conduct to be implemented in conjunction with the new pupil desegregation plan. On November 4, 1975, the district court entered a memorandum and order approving with modification the revised pupil reassignment plan submitted by the Detroit Board. On November 10, 1975, the district court issued an order concerning magnet vocational schools. On November 20, 1975, the district court entered a judgment ordering the Detroit Board to implement these plans. During the Fall, the Detroit Board also submitted revised proposals for each aspect of ancillary relief authorized in the district court's August 15 opinion and order; however, no hearings were held and no record was made on these submissions. See note 9, *supra*; and State Petitioners' Brief at 11 n.7.

On May 11, 1976, while the various appeals of the plaintiffs, Detroit Board, and Teacher Federation were still pending in the Court of Appeals, the district court filed a memorandum, order, and final judgment on magnet

¹⁰ Plaintiffs, as well as the Detroit Board and the intervening Detroit Federation of Teachers, also appealed from the district court's August 28, 1975, order requiring in each school no more than 70% faculty of either race. Cf. PA 83. Plaintiffs believed that this order could serve to maintain the continuing racial identifiability (e.g., RDX 6) of schools solely by reference to staff racial composition. (Plaintiffs thus appealed from the *first* judgment or order which denied them complete faculty relief. Contrast note 5, *supra*, with State Petitioners' Brief at 9.) The Detroit Board appeal argued that it should be allowed to implement complete faculty desegregation as it had requested, while the Detroit Federation of Teachers argued that the district court was without authority to order any faculty desegregation.

vocational centers,¹¹ uniform code of student conduct, remedial reading, in-service training, counseling and career guidance, testing, and school-community relations. PA 115a-150a. Adhering to the view expressed in its August 15, 1975 opinion, the district court was "careful to order only what is essential for a school district undergoing desegregation. . . [T]he court has examined every detail in each proposal to ensure that the components we order are necessary to repair the effects of past segregation, assure a successful desegregation effort and minimize the possibility of resegregation." (PA 117a). With respect to each component of ancillary relief, the district court made specific findings of their necessity under these standards. PA 127a (reading), 128a (in-service training), 129a (counseling and career guidance), 130a (testing).

The State defendants and Detroit Board appealed this judgment insofar as it required the State defendants and Detroit Board to "equally bear the burdens" of the "excess cost imposed by the provision" (PA 146a-147a) requiring these defendants jointly to implement the ancillary desegregation relief of remedial reading, in-service training, testing, and counseling and career guidance.

D. The Judgment of the Court of Appeals

In resolving the numerous appeals and cross-appeals of the parties, the Court of Appeals affirmed, modified, reversed, and vacated various parts of the district court's orders, remanding for further proceedings not inconsistent with its opinion. In summary, the Court of Appeals

¹¹ The district court apparently resolved the sharing of costs and administration of these magnet vocational centers to the satisfaction of the State defendants and the Detroit Board. PA 117a-119a. Contrary to State Petitioners' suggestion (Brief at 12 n.8), however, there can be no question that this was an aspect of desegregation relief, both direct and ancillary. Compare PA 76a-78a, 118a, n.5 with 20 U.S.C. §§ 1701 et seq.

held that the defendant school authorities and the district court totally failed to justify the exclusion of over 100 all-black schools in three administrative regions from the pupil reassignment plan. As these schools and regions were among those "most affected by the acts of *de jure* segregation" (PA 163a), the Court of Appeals held that under *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971), defendants bore the burden of justifying their maintenance as one-race schools; and that they had totally failed to explain the continuation of such *de jure* segregation (PA 163a-164a). The Court of Appeals affirmed the other portions of the plan for pupil reassignments (PA 167a) and affirmed the equitable authority of the district court to order staff desegregation (but vacated for the hearing of additional evidence on the issue (PA 181a-182a)). No party seeks review of these judgments in this Court.

With respect to the issues concerning the four particular "educational components" before this Court for review, the Court of Appeals held that the district court's findings of fact concerning their necessity as essential parts of an effective remedy providing complete relief were "not clearly erroneous, but to the contrary [were] supported by ample evidence." PA 170a. After reviewing the record and the precise claims of error presented by the parties, the Court of Appeals held that the in-service and testing components were essential to insure that staff can "work effectively in a desegregated environment" and that "students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools." PA 170a. Similarly, the Court of Appeals "agree[d] with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation." PA 170a. The Court of Appeals concluded (PA 171a):

[T]he findings of the District Court as to the Educational Components are supported by the record.

This is not a situation where the District Court "appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution." See, *Keyes v. School District*, 521 F.2d 465, 483 (10th Cir. 1975), cert. denied, 44 U.S.L.W. 3399 (U.S. Jan. 12, 1976).

The Court of Appeals also rejected State defendants' claim of immunity from sharing in the actual costs of implementing this ancillary relief. In essence, the Court of Appeals held that the order requiring State defendants to bear a share of the costs of implementation was in form and in actual effect an ancillary consequence of implementing prospective injunctive relief and, under *Edelman v. Jordan*, was therefore not barred. PA 172a-178a. Reviewing the State defendants' substantial contribution "to the unlawful *de jure* segregation that exists" in the Detroit Public Schools, the State defendants' sharing in other costs incident to pupil desegregation (e.g., acquisition of buses and construction of magnet vocational centers), and the relative resources of the State and local defendants, the Court of Appeals found no abuse of discretion in the district court's order requiring the State and local defendants to share equally in the cost of implementing ancillary relief. PA 178a-180a.¹²

¹² The Court of Appeals added:

Our affirmance of the District Court on this issue is not intended as a mandate for a cutback in essential educational programs [in the Detroit Public Schools] in order to meet the expenses of implementing the desegregation plan. We affirm that part of the judgment relating to the costs of the plan, but without prejudice to the right of the District Court to require a larger proportional payment by the State . . . if found to be required by future developments.

PA 180a (emphasis added). Yet the State defendants claim that it is just this supposed "judicially decreed blank check, to be filled in and drawn upon the Treasury of the State . . . to pay for court-ordered educational program expansion, that is before this Court for review." State Petitioners' Brief at 17. Such hyperbole does not fit

Following Justice Stewart's denial of the State defendants' application for a stay on September 1, 1976, the defendant State Treasurer paid over to the Detroit Board the State defendants' share of the projected implementation costs of ancillary relief. On November 15, 1976, this Court granted State defendants' petition for writ of certiorari to review the judgment of the Court of Appeals concerning the propriety of ancillary relief and the State defendants' sharing in the cost burdens of its implementation.

SUMMARY OF ARGUMENT

Plaintiffs appear as Respondents in this Court to defend the judgment of the Court of Appeals on several alternative grounds, some of which were not considered or relied upon by the courts below. Pursuant to the settled practice of this Court, we do this to assist review of a judgment which is correct and raises neither the spectre nor the issue of destroying any sovereignty enjoyed by the State Petitioners under present interpretations of the Constitution and laws of the United States. Contrary to the State Petitioners' claim that the judg-

the actual judgment which is before this Court for review. First, this supposed "judicial decree [*sic*]" is mere *obiter dictum* concerning some possible hypothetical "future developments" which have not yet occurred and, therefore, have not yet been fully plumbed by the record nor made the subject of any injunction, order, or decree. Second, no "blank check" for any "court-ordered educational program expansion" was contemplated by the Court of Appeals; to the contrary, only a portion of the "excess costs," the actual increase in costs from present programs incident to implementation of ancillary relief necessary to remedy the violation, was approved by the Court of Appeals. There will be time enough to argue this supposed "blank check" issue if the *dictum* is ever reduced to an order. Upon a proper showing, however, we have no doubt that there is substantial support for the proposition that educational services may not be substantially reduced as a result of desegregation, at least during the transition to a unitary system of schooling. See, e.g., *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964) and *Adams v. Rankin County Board of Education*, 485 F.2d 324, 327-28 (5th Cir. 1973).

ment below constitutes a federal judicial raid on the State treasury, the issues actually raised although important are much narrower and discrete. (See Introduction, pp. 21-23, *infra*).

1. For purposes of analysis, we first address the issue of plaintiffs' right to relief ancillary to actual pupil reassignments wholly apart from any order compelling State Petitioners to participate in such relief. A review of prior decisions and the record, including the State defendants' representations to the district court, shows that non-discriminatory testing and counseling, in-service training, and remedial reading are necessary and justified in this case to overcome the continuing consequences of the long-standing and pervasive *de jure* segregation violation and to assure a smooth transition now and effective maintenance hereafter of a racially non-discriminatory public school system. Thus, the State Petitioners entirely misconceive the need for an independent "educational" violation as a prerequisite for ordering such relief as an adjunct to pupil desegregation. (See Argument I, pp. 24-29, *infra*.)

2. Assuming *arguendo* that the ancillary relief ordered is proper, we next consider the issue of federal judicial power to compel responsible State officials to participate in providing such relief generally, without regard to the particular money consequences. A review of the prior decisions and the record will show that the courts below had the constitutional power—notwithstanding principles of federalism, and the tenth and eleventh amendments—to order the State Petitioners as active constitutional tort-feasors in the *de jure* violation to participate in implementing relief. State Petitioners may be ordered to take action beyond or in derogation of their authority and duty under State law in order to effectuate relief. (See Argument II, pp. 30-34, *infra*.)

3. We then examine directly whether State Petitioners are immunized under the eleventh amendment from

the particular participation here ordered, which includes sharing in any cost burdens incurred in implementing the ancillary relief. There are a number of alternative grounds, each of which shows that the eleventh amendment does not bar the State Petitioners from sharing in these costs. Although this may have an impact on the State treasury, the cost aspect of the relief is a consequence of complying with a prospective injunctive decree and not a payment of an accrued monetary liability by the State. Under *Edelman v. Jordan* and *Ex parte Young*, therefore, the eleventh amendment does not apply to this form of relief. Assuming, *arguendo*, that the eleventh amendment might apply, there are two alternative grounds upon which the Court's prior decisions show that any immunity of Petitioner State Board of Education has been lifted or waived. First, Congress has specifically authorized federal courts to entertain suits against state boards of education for such ancillary relief in school desegregation cases. 20 U.S.C. §§ 1703(a)(b)(f), 1706, 1720 (and 881(k)). Under *Fitzpatrick v. Bitzer*, the State Board has thereby been deprived of any immunity it might otherwise possess. Second, by state statute, and perhaps its own conduct, Petitioner State Board of Education has waived immunity to this suit.

There are several additional, alternative grounds which sustain the power of the lower courts here to order the relief with cost consequences against State Petitioners in the face of their claim of sovereign immunity. However, these grounds raise substantial constitutional or jurisdictional issues never previously resolved by this Court relating to the direct impact of section 1 of the fourteenth amendment, 28 U.S.C. § 1331, 42 U.S.C. § 1983 and other Reconstruction statutes, and *Ex parte Young* on claims of State sovereignty; and they implicate as well the vitality of *Hans v. Louisiana* with respect to federal-question determinations concerning *de*

jure racial discrimination. We believe the Court should not address these questions in this case unless it cannot agree to sustain the judgment below against claims of sovereign immunity on the several other alternative grounds suggested above. Even then, we respectfully submit that this Court's prior practice counsels that these monumental issues not be resolved prior to remand to the Court of Appeals for initial determination of its views or additional briefing and reargument in this Court on these subjects. (See Argument III, pp. 34-44, *infra*.)

4. Finally, assuming *arguendo* the propriety of ancillary relief and the constitutional power of the courts below to order the State Petitioners to share in the implementation costs, we address the non-constitutional issue of whether the lower courts abused their equitable discretion in the particular circumstances present here. A review of the record will show that the lower courts, particularly the Court of Appeals, were solicitous of State policy in framing relief. Thus, for example, the orders directing acquisition and payment for buses, a monitoring commission, and magnet vocational schools were conformed to State practice and are not at issue in this Court. However, State policy was appropriately modified to the extent of requiring State Petitioners to bear a share of the costs of implementing a portion of ancillary relief, given the relative resources and violations of the parties defendant and the alternatives available. Although State Petitioners made no claim of error in the Court of Appeals and make none in this Court on the amount assessed, it may still be appropriate to remand to the district court for hearings to allow State defendants to make a record to insure that the actual costs previously assessed against State defendants do not exceed their share of the costs which have been incurred in implementing appropriate ancillary relief over the past year. (See Argument IV, pp. 44-49, *infra*.)

ARGUMENT

INTRODUCTION

Plaintiffs Ronald Bradley, et al., appear as Respondents in this Court to defend that portion of the judgment of the Court of Appeals here put in issue by the State Petitioners. That judgment requires the Detroit Board and State defendants to implement four aspects of relief ancillary to actual pupil reassignments:

1. Remedial reading, which is necessary (a) to begin to overcome the continuing, harmful educational effects of the *de jure* segregation on the plaintiff school children, and (b) to insure that the transition to desegregated schooling is effective (PA 170a; 127a; 72a).
2. Non-discriminatory guidance and counseling which is essential for a school system undergoing desegregation in order (a) to overcome the residual effects of the *de jure* segregation which would limit the educational opportunities of black students and taint the attitudes of all students, and (b) to encourage all students to participate in a non-discriminatory and non-segregated fashion in the various magnet and vocational schools and programs designed to alleviate the *de jure* segregation (PA 170a; 128a-129a; 81a).
3. In-service training for staff, which is necessary (a) to enable them to cope with the transition to desegregated schools, and (b) to overcome their own racial attitudes which have been tainted by the *de jure* segregation experience (PA 170a; 128a; 73a).
4. Non-discriminatory testing, which is necessary to insure that black students (a) are not penalized in their present schooling for the harmful effects of the prior *de jure* segregation or by the continuing racial bias inhering in the testing program

of the Detroit Public Schools, and (b) are not resegregated from whites in separate educational programs during the desegregation process (PA 170a; 130a; 78a-79a).

At almost every page of their Brief, however, State Petitioners challenge the requirement that they "bear equally [with the Detroit Board] the burdens of . . . excess cost imposed" (PA 147a, 169a) in implementing the decree. See Brief at 16-17, 23-39. This fixation on the dollar consequences of injunctive relief hides rather than reveals the real interests and issues at stake. Thus, for example, the issue of whether relief ancillary to pupil desegregation is appropriate has, in the first instance, nothing to do with which parties are to be enjoined to provide such relief. Rather, the issue is whether plaintiffs are entitled to such ancillary relief at all. Yet at the outset of State Petitioners' argument on this issue (Brief at 17), they rail against the "judicially decreed blank check" on the state treasury.

As another example, the propriety of ordering the State defendants to provide such ancillary relief jointly with the Detroit Board includes two discrete questions: First, is there constitutional power to order state-level constitutional tort-feasors to provide injunctive relief jointly with local defendants? Second, if so, do the State defendants enjoy some special immunity from sharing in any fiscal consequences of implementing injunctive relief? But State Petitioners focus their argument (Brief at 23-37) almost exclusively on their asserted immunity from supposed federal judicial raids on the State treasury.

As a final example, assuming the *power* of the courts below to enter the order challenged here, there is still a non-constitutional issue: what equitable considerations should guide the shaping of the injunction when State fiscal policy or administrative practice come into con-

flict with such complete relief? Yet State Petitioners in their Brief bury such non-constitutional considerations in their quest for blanket protection.

We therefore urge this Court to review the discrete and much narrower issues actually presented rather than State Petitioners' rhetorical assertions. As will be shown in Argument hereafter, this will allow the Court to review, and to sustain, the judgment below without implicating the monumental constitutional issues expressly left unresolved by this Court since the adoption of the Civil War Amendments and the ensuing Reconstruction Legislation.

This narrower approach is particularly appropriate in the circumstances of this case where the non-judicial conduct of the district judge (*see* note 9 and discussion, *supra*, pp. 12-13) has prevented the making of a full record, even though State Petitioners make no claim of procedural error. Plaintiffs therefore appear here as Respondents not to defend the procedures of the district court, but to defend the judgment of the Court of Appeals based on the substantial evidentiary support for the particular ancillary relief at issue. A review of the evidence shows the propriety of ancillary relief in school desegregation cases such as this.

In support of the judgment, plaintiffs also urge several grounds "whether or not that ground was relied upon or even considered by the [lower] court." *Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6 (1970). See also *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924); *Langnes v. Green*, 282 U.S. 531, 535-39 (1931). Application of this settled approach to appellate review will materially assist the Court in deciding this case based on existing precedent without reaching the unresolved constitutional issues on which State defendants and the State *amici* seek a final, and in our view constitutionally destructive, advisory opinion.

I.

RELIEF ANCILLARY TO PUPIL DESEGREGATION IS APPROPRIATE BECAUSE ESSENTIAL TO REMEDY THE CONTINUING HARMFUL EFFECTS OF THE *DE JURE* SEGREGATION VIOLATION AND OTHERWISE TO INSURE THE TRANSITION TO AND MAINTENANCE OF A RACIALLY NON-DISCRIMINATORY DETROIT PUBLIC SCHOOL SYSTEM.

State Petitioners' broadside at all relief ancillary to actual pupil reassignments is unwarranted given the record below and settled case law. As Petitioners would have it, the remedy for a long and pervasive history of almost total, *de jure* segregation is limited exclusively to pupil reassignments—regardless of the proof concerning the harmful effects of such state-imposed segregation on the educational opportunities of plaintiff children, of the record showing the need for ancillary relief to insure an effective transition to a non-discriminatory system of pupil attendance and schooling, and of the other evidence concerning aspects of racial discrimination already existing in the school district or likely to appear during the desegregation process. See Statement, *supra*, at notes 2, 4, and 8, and accompanying text.¹³

The Petitioners' novel view would also disregard the traditional equitable authority and duty of the federal

¹³ The sweep of Petitioners' challenge to the authority of the chancellor sitting in equity to order any necessary relief beyond pupil reassignments may result solely from their concerns about the State treasury rather than the propriety of such ancillary relief. For that reason, it may be helpful for purposes of analysis to consider the propriety of the ancillary relief apart from the State sovereignty claims by assuming, *arguendo*, that the injunction runs only against the Detroit Board. Cf. *Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4081 (U.S. Jan. 11, 1977) (school district "not entitled to assert any Eleventh Amendment immunity from suit in federal courts.")

courts to root out the violation by rendering "a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States v. Louisiana*, 380 U.S. 145, 154, 156 (1965). "For it is the historic purpose of equity to 'secur[e] complete justice,' *Brown v. Swann*, 10 Pet. [U.S.] 497, 503 (1836)." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). This principle of "complete justice" has always guided federal equity courts:

where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief.

Bell v. Hood, 327 U.S. 678, 684 (1946). See also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946); *Brown II*, 349 U.S. 294, 300-01 (1955); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Ford Motor Co. v. United States*, 405 U.S. 562, 575-78 (1972). And the burden is on the discriminator not the victim to show that the injury and harm reasonably feared to result from the discrimination did not in fact occur, at least for purposes of insuring that the continuing harmful effects of the violation are remedied.¹⁴ Once plaintiffs have proven a substantial violation, doubts about what remedies will provide effective and lasting relief should be resolved in favor of the victims rather than the perpetrators of the unlawful conduct.¹⁵

In the face of the uncontroverted evidence and settled principles of equity, State Petitioners argue that, because

¹⁴ E.g., *Franks v. Bowman Transp. Co.*, 44 U.S.L.W. 4356, 4363 (U.S. 1976); cf. *Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973).

¹⁵ E.g., *Ford Motor Co. v. United States*, *supra*, 405 U.S. at 575; *Zenith v. Hazeltine*, 395 U.S. 100, 123-24 (1969); *United States v. E. I. DuPont de Nemours Co.*, 366 U.S. 316, 334 (1961); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1945); *Story Parchment Co. v. Patterson Paper Co.*, 282 U.S. 555, 563 (1931).

the only violation found in the first violation opinion was *de jure* pupil segregation, *Milliken* and *Swann* limit the remedy solely to pupil reassignments. In support of this argument, State Petitioners (Brief at 18) parrot the phrase that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *Milliken*, 418 U.S. at 744. Thus, under State Petitioners' wooden view of violation and remedy, the courts below lacked authority to order *any* relief ancillary to pupil reassignments because "there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system." Brief at 18.

Yet State defendants' own conduct and evidence belie this unprecedented argument. First, State defendants have acquiesced and assisted in implementing other "ancillary relief" ordered in this case—construction of vocational centers, acquisition of and payment for buses, and operations of a monitoring commission. See Statement, *supra*, at pp. 13-14; and State Petitioners' Brief at 8 and 11-12. Second, the managing agent of State defendants, offered as their expert, readily admitted at trial that the four aspects of ancillary relief here at issue were either "required" or "deserve some special emphasis" in implementing a pupil desegregation plan and may otherwise serve as a vehicle for beginning to "repair damage done by segregation." A 85-97. Indeed, given the State defendants' experience with such ancillary relief in the many other school desegregation cases in Michigan and the testimony of administrators from a Title IV school desegregation center that such ancillary relief is regularly included as part of the relief in school systems undergoing desegregation, the Petitioners' argument is, literally, incredible. They have *no* basis for implying (Brief at 20-21) that in the twenty-two years since *Brown*, such ancillary relief has had no place in the school desegregation process. Thus, State defendants' ad-

missions and experience, as well as the substantial evidence, support the holding of the courts below that such ancillary relief is necessary to remedy the continuing consequences of the violations found, and is essential in the transition to a racially non-discriminatory system of schooling.

This conclusion is also supported by case law, express congressional authorization, and HEW regulations. First, courts have regularly included such ancillary relief in desegregation decrees in order (1) to eradicate the residual resource and educational opportunity discriminations, as well as the continuing harm resulting from the primary pupil segregation violation, and (2) to insure the effective implementation of pupil desegregation and transition to effective racial non-discrimination in public schooling.¹⁶ Such essential ancillary relief is included in school desegregation decrees precisely because it is "designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken*, 418 U.S. at 746.

Second, Congress and HEW have on several occasions analyzed the need for precisely such ancillary relief to insure effective desegregation. They have not only found it essential, but have provided funding and technical assistance to state and local educational agencies for that purpose. See, e.g., Emergency School Aid Act, 20 U.S.C.

¹⁶ E.g., *Morgan v. Kerrigan*, 401 F. Supp. 216, 231, 234-35 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967); *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969); *United States v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1971); *Lee v. Macon County Board of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), 317 F. Supp. 103 (M.D. Ala. 1970); *United States v. Missouri*, 523 F.2d 885, 887-88 (8th Cir. 1975). Cf. *Gaston County v. United States*, 395 U.S. 285 (1969) and *Swann*, 402 U.S. at 18-20; *Wright v. Council of City of Emporia*, 407 U.S. 451, 465 (1972); *Gilmore v. City of Montgomery*, 417 U.S. 556, 571 (1974); *Rogers v. Paul*, 382 U.S. 198 (1965).

§§ 1601 and 1606(a); 45 C.F.R. §§ 180.12, .31, .41; 42 U.S.C. §§ 2000c-2 and c-4; 45 C.F.R. § 185.12(a) (reprinted in Appendix B attached hereto).¹⁷ Congress and HEW, like the courts, have thus expressly recognized that the elimination of *de jure* pupil segregation requires more than just pupil reassignments to be effective in beginning to overcome the harm inflicted by the violation as well as to insure the transition to racially non-discriminatory schooling.

The point of this judicial, congressional, and administrative authority is not to give federal judges a roving commission to order general improvements in the education offered students in school districts found guilty of *de jure* segregation. Due at least in part to the critical examination given the Detroit Board's initial proposals by the plaintiffs (and by the State defendants), plaintiffs (and this Court) can be certain that the ancillary relief contemplated by the parties and the district court prior to the district judge's remarkable exclusion of plaintiffs from further proceedings (*see* note 9, *supra*) was carefully limited to the equitable tasks at hand—to remedy the harmful effects and residual discrimination inhering in the *de jure* segregation violation, to overcome the other racial discriminations in schooling of record, and to assist the transition to a racially non-discriminatory system of schooling. And the Court of Appeals was

¹⁷ *See also* 116 CONG. REC. 18109-10 (1970); S. REP. 92-61 at 8, 13 (1971); H. REP. 92-576 at 5, 13 (1971); *Toward Equal Educational Opportunity*, Report of the Select S. Comm. on Equal Educational Opportunity, 92 Cong., 2d Sess. at 129-40, 233-37 (1972) (Comm. Print). *Cf.* Equal Educational Opportunities Act of 1974, particularly 20 U.S.C. §§ 1703(a)(b)(f) and 1713(a). It is also relevant that two of the most experienced professionals from one of the authorized Title IV School Desegregation Centers carefully examined the ancillary relief here at issue to insure that its purposes, programs, and costs were limited to essential adjuncts of the pupil desegregation relief rather than providing only generally improved educational opportunities. *See* note 8, *supra*.

thereafter careful to insure that the ancillary relief as finally decreed does *not* present "a situation where the District Court appears to have 'acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' *See, Keyes v. School District*, 521 F.2d 465, 483 (10th Cir. 1975)." PA 171a.

Aside from presenting a stone wall to the ancillary relief here, State Petitioners therefore offer *no* reason, authority, nor record evidence to suggest any abuse of equitable discretion or excess of judicial authority in the relief ordered by the lower courts.¹⁸ To put the point bluntly, State Petitioners' challenge to the authority of the courts below to order any ancillary relief is naught but a frolic or detour on the way to consideration of their primary claim that *they alone* among the culpable defendants should be free from judicial compulsion to implement such manifestly appropriate relief.

¹⁸ Thus, State defendants do *not* argue, for example, that special remedial reading is not necessary to overcome the lingering harmful effects of the *de jure* segregation on the educational opportunity plaintiff school children will enjoy during desegregation; that non-discriminatory testing, guidance and counseling are unrelated to avoiding incorporation of these same harmful effects, other racial bias, and resegregation in the black school children's enjoyment of the diverse magnet, vocational and other educational programs of the Detroit School District; that special in-service training of staff is not an integral part of the transition process during pupil desegregation. It is also relevant that the Detroit Board has conceded the independent violations of educational opportunity and resource discrimination along racial lines which is supported by the record evidence. *See, e.g., Detroit Board Brief in Opposition to Certiorari*, at 9; and *Statement, supra*.

II.

APART FROM THE COST IMPACT, THERE IS NO TENABLE CLAIM THAT CONSTITUTIONAL PRINCIPLES OF FEDERALISM, THE TENTH OR ELEVENTH AMENDMENT BAR STATE DEFENDANTS' PARTICIPATION IN IMPLEMENTING THE APPROPRIATE ANCILLARY RELIEF.

For purposes of analysis, we assume in this Argument II that the ancillary relief ordered below was proper, and we consider only those aspects of State Petitioners' claim of absolute immunity which do not involve the cost impact of implementing the relief.¹⁹ In subsequent sections, we shall consider the cost impact (*see* Argument III), as well as the non-constitutional factors which may guide equitable discretion assuming judicial power (*see* Argument IV). Although the statement of the question in this fashion seems to render the answer constitutionally obvious, we believe this approach is analytically required because State defendants' claim of sovereign immunity seems to involve *more* than just an eleventh amendment claim of protection from damage awards and related money judgments. Thus, for example, Petitioners do not here challenge the lower courts' authority to order them to share substantially in the large cost of buses, to provide monitoring services, and to implement the magnet vocational centers, at least so long as those orders conform to State defendants' view of State policy and practice. *See* Petitioners' Brief at 8 n. 6, 11-12 n. 8; also Statement, *supra*, notes 7 and 11.

The *power* of the lower courts to enjoin State Petitioners to assist in implementing appropriate injunctive

¹⁹ We do not deal with mere fictions, however, for the form of the lower court's decree could just as easily have ordered that State defendants implement the in-service and testing components alone rather than jointly with the Detroit Board and thereby avoid altogether mention of the costs of implementation.

relief cannot be seriously doubted once it is remembered that these defendants, and the State of Michigan, were previously adjudicated to have contributed substantially to the *de jure* segregation of the Detroit Public Schools. *Bradley v. Milliken*, 338 F. Supp. at 589, 484 F.2d at 238-242, 418 U.S. at 734-35 n. 16. *See also Hills v. Gautreaux*, 425 U.S. 284, 298 n. 13 (1976). These violation findings were manifestly correct, and State defendants have not challenged them here. Given this fourteenth amendment violation, *Ex parte Young*, 209 U.S. 123, 159-60 (1908), provides the complete rationale, albeit an historic "fiction," by which the federal courts may order injunctive relief against the State officials here to remedy the violation and its effects. As stated by Mr. Justice Rehnquist for the Court in *Edelman v. Jordan*, 415 U.S. 651, 664 (1974), the *Ex parte Young* "holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."

Yet the State defendants seem to suggest that the "sword" provided in *Ex parte Young* has been removed *sub silentio* by the Court's recent interpretations of the tenth amendment and "principles of federalism" in *National League of Cities v. Usery*, 49 L.Ed.2d 245 (1976) and *Rizzo v. Goode*, 423 U.S. 362 (1976). *See* Petitioners' Brief at 26-31. This constitutionally revolutionary assertion will not withstand scrutiny.

First, the tenth amendment holding in the opinions for the five-member majority of the Court in *National League of Cities v. Usery* is that Congress may not wield its power under the Commerce Clause to enact statutes which "impair the state's ability to function effectively within a federal system," 49 L.Ed.2d at 257, so as to "devour the essentials of state sovereignty," 49 L.Ed.2d at 259—unless, of course, "the federal interest is demonstrably greater" under a "balancing approach," 49 L.Ed.

2d at 260 (Blackman, J., concurring). It is inconceivable that this decision was intended to modify without mention the long-standing constitutional power and equitable authority of federal courts under *Ex parte Young* to order state officials found to have violated the fourteenth amendment to implement otherwise appropriate injunctive relief to remedy the violation and all its consequences. Speaking for the Court, Mr. Justice Rehnquist said nothing to intimate that this traditional "sword" of federal judicial authority under *Ex parte Young* to redress particular denials of the fourteenth amendment was suddenly to be sheathed in the face of the tenth amendment. The tenth amendment has, after all, been coexisting with, but without impeding the reach of, the Civil War amendments for over a century of Constitutional Union and Supreme Court decisions.

Second, the "principles of federalism" cited in *Rizzo*, 423 U.S. at 380, do not abrogate the constitutional power of a federal court to enjoin state officials to remedy their own violations of the fourteenth amendment. See *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 238-41 (1976). For in *Rizzo*, the Court found that the injunctive relief decreed by the lower courts ran against city officials who had not themselves committed any constitutional violation, 423 U.S. at 376, 378. Here, in contrast, there is no question that State defendants participated directly in the constitutional violation of *de jure* segregation; and, assuming that Argument I *supra*, is correct, there is no question that the State defendants have been enjoined to redress the violation and its effects not to "fashion prophylactic procedures . . . to minimize misconduct on the part of a handful of employees." 423 U.S. at 378. Like *Usery*, Mr. Justice Rehnquist's opinion for the Court does not suggest that *Rizzo* limits the power of the federal judiciary, upon a proper showing, to order state officials under the doctrine of *Ex parte Young* to

redress their violations of the fourteenth amendment.²⁰ Cf. *Hills v. Gautreaux*, 425 U.S. 284, 293-300 (1976).

Finally, *Rizzo* and *Usery* do not purport to alter in any way the traditional power of federal courts to order action which exceeds or is in derogation of otherwise constitutionally valid state policy or practice where necessary to provide relief from constitutional violations. The settled law of this Court, consistently followed by the lower courts, is that otherwise valid state law or policy must yield or may otherwise be suspended to the extent necessary to provide complete relief, even if the state policy or practice does not constitute an "independent constitutional violation."²¹ This federal judicial power to enjoin state officials to provide necessary relief inheres in the Supremacy Clause and the fourteenth amendment which further limits State sovereignty. See *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880); *Ex parte Young*, *supra*, 209 U.S. at 159-60; *Fitzpatrick v. Bitzer*, 49 L.Ed.2d 614, 620-22 (1976); *Edelman v. Jordan*, *supra*, 415 U.S. at 664.

Thus, the general power of the lower courts to enjoin State defendants to participate in implementing relief cannot be seriously questioned here. We turn then to

²⁰ Argument IV, *infra*, considers the issue of how equitable, non-constitutional considerations may guide or limit the use of this constitutional power in light of state policy and practice and principles of federalism.

²¹ *Wright v. Council of City of Emporia*, 407 U.S. 451, 459 (1972). See also, e.g., *United States v. Scotland Neck*, 407 U.S. 484, 488-89 (1972); *North Carolina v. Swann*, 402 U.S. 43, 45 (1971); *Griffin v. County School Board*, 377 U.S. 218 (1964); *Brown II*, 349 U.S. at 300-301; *United States v. Greenwood Municipal School District*, 406 F.2d 1086, 1094 (5th Cir. 1969); *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368-69 (8th Cir. 1970); *Carter v. Gallagher*, 452 F.2d 327, 328 (8th Cir. 1971); *United States v. Mississippi*, 339 F.2d 679, 684 (5th Cir. 1964); *United States v. Duke*, 332 F.2d 759, 769-70 (5th Cir. 1964); *Gautreaux v. City of Chicago*, 480 F.2d 210, 214 (7th Cir. 1973).

the common denominator of State Petitioners' claims, i.e., that they are immunized from participating in implementing such appropriate ancillary relief because a consequence is that it will cost the State treasury money.

III.

THE ELEVENTH AMENDMENT DOES NOT IMMUNIZE STATE DEFENDANTS FROM BEING REQUIRED TO IMPLEMENT JOINTLY WITH THE DETROIT BOARD THE PROSPECTIVE ANCILLARY RELIEF, INCLUDING SHARING IN THE COSTS OF IMPLEMENTATION.

In this section we consider the State Petitioners' argument that their sovereign immunity operates to shield them from sharing in the costs of implementing ancillary relief. We believe this absolute immunity issue should be resolved by reference to decisions construing the eleventh amendment. For decisions concerning general "principles of federalism" and the tenth amendment address either more general, non-monetary relationships concerning the supremacy of Federal authority vis-a-vis State sovereignty (*see* Argument II, *supra*) or the proper exercise of equitable discretion assuming the Federal judicial power to compel the State to act (*see* Argument IV, *infra*).

A. The Judgment Below Is Not Barred by the Eleventh Amendment Because the Impact on the State Treasury Is a Consequence of Complying with Prospective Injunctive Relief.

As this Court noted in considering the order requiring Illinois to make retroactive payment of wrongfully withheld welfare monies in *Edelman v. Jordan*, 415 U.S. at 667, "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that be-

tween night and day." In *Edelman*, however, the Court articulated the nature of the difference. The eleventh amendments bars "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury," 415 U.S. at 663, that is, "a suit which seeks the ["retroactive"] award of an accrued monetary liability which must be met from the general revenues of a State," *id.* at 664, even if "labeled 'equitable' in nature," *id.* at 666.

In contrast, *Ex parte Young* permits "prospective" relief against States and their officials "to conform [their] future conduct . . . to the requirement[s] of the Fourteenth Amendment," 415 U.S. at 664, even if that relief has "greater impact on state treasuries," *id.* at 667. This "ancillary effect on the state treasury" is not barred by the eleventh amendment to the extent such "fiscal consequences [are] the necessary result of compliance with decrees which by their terms [are] prospective in nature," *id.* at 667-68. Thus, this Court in *Edelman* held that the eleventh amendment barred an order requiring Illinois State officials to make retroactive payments of previously withheld welfare checks; the order was "in practical effect indistinguishable in many aspects from an award of damages against the state. . . . [It was] measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668.

Applying these criteria to this case, it is as clear as most days that the relief sought and ordered below is permitted under *Ex parte Young* rather than barred by the eleventh amendment. First, this suit has always sought (and still seeks) a racially non-discriminatory system of schooling for plaintiff children now and hereafter not money damages or other retroactive payments for an accrued monetary liability. Second, the injunctive decree against State Petitioners is prospective in nature;

it requires compliance, now and hereafter, with the command of *Brown II*, 349 U.S. at 301, to operate a racially nondiscriminatory school district, free of the vestiges of *de jure* segregation. PA 178a.

These two factors distinguish this decree from the retroactive payments in *Edelman* and show that the prime thrust of the decree here is to provide traditional, prospective, injunctive relief under *Ex parte Young* which is not barred by the eleventh amendment.²²

State Petitioners nonetheless apparently argue that the shadow of the eleventh amendment falls over this case because the decree includes a provision requiring that State and local defendants "shall . . . equally bear the burdens" of the costs of their joint implementation of relief.²³ State Petitioners claim that this constitutes a direct raid on the State treasury barred by the eleventh amendment. Brief at 31, *et seq.* The fallacy in this approach can be most easily seen by assuming for purposes of analysis that the decree, instead of requiring such joint implementation of ancillary relief, ordered each set of defendants to implement two of the "components" separately. *Cf.* note 19, *supra*. Such a decree might be subject to a challenge on grounds of an abuse

²² Describing the prospective as contrasted to the retroactive nature of such ancillary relief, Judge Garrity in the Boston school case noted that plaintiffs do not seek relief which would make them whole and compensate them as a class, with money damages or other compensatory relief, for the "immense injury . . . already wrought by the defendants' long practiced racial discrimination." *Morgan v. Kerrigan*, *supra*, 401 F. Supp. at 231 and n.5. Rather, "the remedy . . . assures that past discriminatory practices will work no further harm," *id.* at 231, by including measures, *inter alia*, to eliminate "the persisting effects of past discrimination." *Id.* at 234.

²³ This provision apportioning implementation costs also guarantees that these costs will be strictly limited to the ancillary relief actually ordered by the court rather than include costs incident to services, programs, or personnel already budgeted by the Detroit School District independent of the decree. PA 146a.

of equitable discretion (*see* Argument IV, *infra*) but it most certainly would not be barred by the eleventh amendment. For the equally large costs of such direct implementation then borne by the State defendants would obviously have only an "ancillary effect on the state treasury"; such "fiscal consequences [would be] the necessary result of compliance with [a] decree which by [its] terms [is] prospective in nature." *Edelman v. Jordan*, 415 U.S. at 667-68.

Viewed in this light, the portion of the decree requiring the State defendants to share equally with the Detroit Board in the costs of joint implementation merely apportions these fiscal consequences of future compliance with a prospective decree between State and local defendants. This mere apportionment of any implementation costs surely does not serve to make what is otherwise manifestly a permissible ancillary effect on the State treasury into a retroactive payment for an accrued monetary liability barred by the eleventh amendment.²⁴ Thus, the decree "requires payment of state funds . . . [only]

²⁴ In posing this hypothetical decree for purposes of analysis, we are not asking the Court to judge an award which might have been tailored differently than the one actually made in this case. *Cf. Edelman v. Jordan*, 415 U.S. at 665-66. Rather the point of the hypothetical is to show that the decree actually made in this case merely apportions the ancillary effects on the State treasury which are otherwise permissible under *Ex parte Young* and not barred by the eleventh amendment. In so doing, it becomes clear that the eleventh amendment policy considerations which underlie the result in *Edelman* are not present here: there is no direct drain on the State treasury to reimburse (or provide "refunds" to) victims for past transgressions of the law but only such ancillary effect on State funds as is necessary to secure future compliance with the command of *Brown II* to insure the transition to and maintenance of a non-discriminatory system of schooling. *Cf. Edelman v. Jordan*, 415 U.S. at 666 n.11; *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945). Indeed, for purposes of analysis under *Edelman*, there is no difference in kind or effect on the State treasury of these costs and those incurred with respect to the injunctive relief concerning buses, magnet vocational centers, and a monitoring commission, which State defendants have previously conceded is not barred by the eleventh amendment. *See* notes 7 and 11, *supra*.

as a necessary consequence of compliance in the future with a substantive federal-question determination" concerning complete relief from a *de jure* segregation fourteenth amendment violation, rather than "as a form of compensation to those" injured. 415 U.S. at 668.

The Court of Appeals properly rejected State defendants' claim to sovereign immunity in holding that the "order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of *de jure* segregation. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969)." PA 178a. See also PA 172a-173a.²⁵ Merely requiring the guilty parties to share the ancillary fiscal consequences of such prospective relief does not convert the remedy into an award of money damages nor render the decree retroactive.

B. In the Alternative, Congress Has Specifically Lifted Any Sovereign Immunity from This Suit Otherwise Enjoyed by the Defendant State Board of Education Pursuant to Congress' Enforcement Powers Under Section 5 of the Fourteenth Amendment; and, in Any Event, the State Has Specifically Waived Its Immunity to Suit Here.

1. Assuming, *arguendo*, that the eleventh amendment might apply to the decree here, any claim of sovereign immunity has been lifted by specific Act of Congress pursuant to its enforcement powers under section 5 of the fourteenth amendment. Congress has specifically authorized suit against the defendant State Board of Edu-

²⁵ This was the sole ground addressed by the Court of Appeals in rejecting State defendants' claim to sovereign immunity under the eleventh amendment. Although the alternative grounds discussed, *infra*, were not considered by the Court of Appeals, they nonetheless support the judgment below and are therefore properly before this Court for review. See *Langnes v. Green*, *supra*, 272 U.S. at 535-59, and cases cited in the Introduction to Argument, *supra*, p. 23.

cation for violations of the Equal Educational Opportunities Act of 1974 and provided federal courts with the jurisdiction to hear such cases. See 20 U.S.C. §§ 1703 (a), (b) and (f), 1706, 1708, and 1720 (also 20 U.S.C. § 881 (k) which defines the term "state education agency" to include the State Board of Education) (reprinted in Appendix B attached hereto). Under *Edelman v. Jordan*, 415 U.S. at 672, and *Fitzpatrick v. Bitzer*, 49 L.Ed. 2d 614, 619-22 (1976), this congressional authorization to join the State Board of Education as a party defendant in causes of action under 20 U.S.C. § 1701, *et seq.*, lifts the immunity which might otherwise be enjoyed by the State, at least with respect to the Petitioner State Board of Education.

As the Court summarized in *Fitzpatrick*, 49 L.Ed.2d at 620-21, this is so because the Civil War Amendments constitute limitations on State sovereignty and sanction intrusions into the judicial, executive, and legislative spheres of autonomy previously reserved to the States and/or the people. The Court stated the controlling constitutional principle in *Ex parte Virginia*, 100 U.S. 339, 346-48 (1880):

The prohibitions of the 14th Amendment are . . . restrictions of state power. It is these which Congress is empowered to enforce. . . . Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact . . . [E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them . . . [T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the 14th Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits, it is complete.

As held by the Court in *Fitzpatrick*, "we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." 49 L.Ed.2d at 621. Congress thus acted properly in 20 U.S.C. §§ 1701, *et seq.*, to authorize suit against the defendant State Board of Education even if "constitutionally impermissible in other [i.e., non-section 5] contexts," 49 L.Ed.2d at 622, and thereby "abrogate[d] the immunity conferred by the Eleventh Amendment." 49 L.Ed. at 619.

The only remaining issues concern whether the Act should be used in deciding this appeal and whether its terms support the judgment below. First, under this Court's decisions culminating in *Bradley v. School Board*, 416 U.S. 696, 711-21 (1974), the provisions of the Act should be applied to decide a pending appeal such as this. The Act involves "great national concerns," *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), not private disputes; and Congress did not limit the Act only to prospective effect. Therefore, the "court must decide according to existing laws." *Id.* Second, the findings and record below concerning the continuing *de jure* segregation violations and their harmful consequences on the educational opportunities of plaintiff children (see *Statement, supra*, pp. 5-7, 10-11), show that a cause of action has been made out against the Petitioner State Board of Education under 20 U.S.C. §§ 1703(a), (b) and (f).²⁶

²⁶ It is also relevant that the drafters of 20 U.S.C. §§ 1701, *et seq.*, intended that such ancillary relief be included as remedies for *de jure* segregation violations. See, e.g., 118 CONG. REC. 8928, 8930 (1972) (message of Pres. Nixon); Equal Educational Opportunity Act, hearings before the H. Comm. on Educ. & Labor, 92d Cong., 2d Sess. 10 (1972) (Sec'y Richardson). See also, 20 U.S.C. §§ 1703(f), 1706, 1713(g). Indeed such ancillary relief was hoped by many of the Act's sponsors to be a complete substitute for pupil reassignment beyond the schools in closest proximity to any child's residence;

Thus, the ancillary relief ordered here against the State Board of Education, even if the equivalent of money damages for an accrued liability, is not barred by the eleventh amendment; for the State Board of Education has been expressly subjected to such suits by the Congress enforcing its power under the fourteenth amendment. *Fitzpatrick v. Bitzer*, 49 L.Ed.2d at 620-22.²⁷

2. In the alternative, the State of Michigan has expressly waived the immunity to suit of the State Board of Education. Pursuant to MICH. STAT. ANN. § 15.1023 (7), the "state board of education may sue and be sued, plead and be impleaded in *all* courts in this state" (emphasis added). Although the courts below did not focus on the effect of this statute, the district court did in the Kalamazoo school case. See *Oliver v. Kalamazoo Board of Education*, — F.Supp. — (Nov. 5, 1976) (CA #K-88-71), appeal pending. Relying on *Soni v. Board of Trustees*, 513 F.2d 347, 352-53 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3702 (U.S. June 7, 1976), the

thus, these sponsors were not overjoyed when the Congress included a specific "savings clause," 20 U.S.C. § 1702(b), as well, in order to guarantee that the power of the federal courts to require pupil reassignments to secure compliance with *Brown* would not be limited or modified in any way. See 120 CONG. REC. S13349-85 (1974); 120 CONG. REC. H7389-7419 (1974); *Morgan v. Kerrigan*, 530 F.2d 401, 411-15, 419 n.24 (1st Cir. 1975); *Brinkman v. Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1976). This "savings clause" in what otherwise might have been "anti-busing" legislation was certainly appropriate for an Act purporting in name "to enforce" (rather than "in effect to dilute") the fourteenth amendment. See *Katsenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

²⁷ As the parties did not focus and the Court of Appeals did not pass on this ground, "it may be appropriate to remand the case rather than deal with the merits of the question in this Court." *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970). On this particular issue, however, the Court's settled decisions in *Bradley v. School Board* and *Fitzpatrick v. Bitzer*, as well as the findings and uncontroverted record below, make the decision so obvious that remand to the Court of Appeals would serve no purpose.

Oliver court found in this statute an express waiver of sovereign immunity under the eleventh amendment. Recognizing that waiver of a State's immunity to suit in federal court must be express, *Edelman v. Jordan*, 415 U.S. at 673, the court found that the phrase "all courts in this state" had been advisedly used in contrast to, for example, "state courts" or "courts of this state." *Oliver*, slip op. at 6. Reviewing other Michigan statutes, cases, and practice, the court found no indication that this express waiver of immunity was intended to be limited to state courts. Thus, the district court in *Oliver* properly concluded that state law expressly waives any of the State Board of Education's immunity under the eleventh amendment from suits such as this. Cf. *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 392 (1884). For the "consent to be sued inescapably subjects the [State Board] to the hazard of having a money judgment rendered against it." *Soni v. Board of Trustees*, *supra*, 513 F.2d at 353.²⁸

C. In the Alternative, the Judgment Below Is Not Barred by the Claim of Sovereign Immunity Because Section 1 of the Fourteenth Amendment, Both in Its Direct Impact and as Enforced by Congress Through 42 U.S.C. § 1983, 28 U.S.C. § 1331 and Other Reconstruction Legislation, Supercedes the Eleventh Amendment.

As final alternatives, we come to other potential limitations of the State Petitioners' claim to sovereign immunity: passage of the fourteenth amendment itself and congressional enactment of 42 U.S.C. § 1983, 28 U.S.C. § 1331 and other Reconstruction legislation enforcing the

²⁸ The further question is posed whether the State defendants may in the same judicial proceeding on one day acquiesce in relief which has precisely the same effect on the State treasury as relief which they choose to oppose the next. See notes 7, 11, and 23, *supra*. Or does such conduct mean that the State Board of Education has, "in effect consented to the abrogation of [any eleventh amendment] immunity" for this case? *Edelman*, 415 U.S. at 672.

fourteenth amendment. We believe that cases such as *Ex parte Virginia*, *Ex parte Young*, and *Fitzpatrick v. Bitzer*, implicitly recognize that these historic changes fundamentally restructured the Constitutional Union so as to authorize suits directly against the States and their officers, thereby abrogating their immunity from direct money judgments in cases of *de jure* racial discrimination. For, as the Court recognized in *Fitzpatrick v. Bitzer*, not only does exercise of the section 5 enforcement power "necessarily" limit the "principle of State sovereignty" found in *Hans v. Louisiana*, but "the other sections by their own terms embody limitations on State authority." 49 L.Ed.2d at 622. We also believe that the framers of the Civil War Amendments and the Reconstruction legislation, as well as the States themselves, either intended or accepted this complete limitation of State sovereignty within the reach of the fourteenth amendment. Our reasoning in support of these beliefs is outlined in Appendix A attached to this brief.²⁹

We recognize, however, that this Court has never previously resolved these constitutional issues and on many occasions has expressly refrained from doing so. *E.g.*, *Ex parte Young*, 209 U.S. at 150; *Edelman v. Jordan*, 415 U.S. at 694 n.2 (Marshall, J., dissenting); *National League of Cities v. Usery*, 49 L.Ed.2d at 258 n.17; and *Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. at 4080-81. See also, *Fitzpatrick v. Bitzer*, *supra*. There is no need to resolve these fundamental constitutional and jurisdictional issues in this case if the Court finds the alternative grounds set forth in Arguments III A and III B, *supra*, pp. 34-42, sufficient to affirm the judg-

²⁹ These views may also call into question the continuing vitality of *Hans v. Louisiana*, 134 U.S. 1 (1890), a decision which we believe fundamentally misconstrued Justice Iredell's dissent in *Chisolm v. Georgia*, and, therefore, the purpose and effect of the eleventh amendment. Cf. *Fitzpatrick v. Bitzer*, 49 L.Ed.2d at 622, 623 n.2 (concurring opinions of Brennan, J., and Stevens, J.).

ment of the court below. But if the Court finds these alternative grounds alone or in combination inadequate, then the Court cannot dispose of this case on the State Petitioners' claim of sovereign immunity without reaching the unresolved constitutional and jurisdictional issues.

Although Appendix A outlines the argument on these issues, the parties and the court below never focused on them. We therefore believe that the prior practice of this Court counsels either a remand to the Court of Appeals for its initial consideration of these issues, *Dandridge v. Williams*, *supra*, 397 U.S. at 475-76 n.6, or full re-briefing and argument on these historic issues as in *Brown*. These unresolved issues are too important, and for too long have been expressly avoided, to permit their summary resolution.

IV.

IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE THE LOWER COURTS DID NOT ABUSE THEIR EQUITABLE DISCRETION IN ORDERING THE STATE DEFENDANTS TO IMPLEMENT ANCILLARY RELIEF JOINTLY WITH THE LOCAL DEFENDANTS.

In this section of Argument we assume for purposes of analysis that ancillary relief is appropriate (Argument I), that the lower courts had the power to compel State defendants to participate in implementing such ancillary relief (Argument II), and that the eleventh amendment does not immunize State defendants from sharing in the cost burdens of such implementation (Argument III). In sum, we assume the *constitutional power* of the courts below to order the relief here challenged by State Petitioners. In this part we consider whether, in the particular circumstances of this case, there are nonconstitutional factors which so limit or guide the ex-

ercise of equitable discretion as to require reversal or modification of the injunction at issue.³⁰ We believe that a review of the record will show that the injunction here at issue does not exceed equitable limitations and is tailored to fit state practice and local circumstances.

First, State and local defendants acted jointly and severally to commit long-standing and pervasive violations of plaintiffs' constitutional right to a racially non-discriminatory system of schooling. It is therefore appropriate not only to provide adequate relief from the violation to plaintiffs; *prima facie*, it is also proper to shape the injunctive decree so that both wrongdoers share in the burden of implementing relief, including any costs. *Cf. W. PROSSER, LAW OF TORTS* § 52 at 314-16 (4th ed. 1971).

³⁰ Although State Petitioners may not have briefed these non-constitutional, equitable considerations, we recognize that such issues are at least implicated in the questions on which this Court granted certiorari. *Cf. Supreme Court Rule 23(1)(c)*. In any event, it is appropriate for this Court to determine whether there has been an abuse of equitable discretion here:

That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. . . . [W]hat is required is the principled application of standards consistent with [the] purposes [of the right at stake] and not equity which varies like the Chancellor's foot.

Albermarle Paper Co. v. Moody, 422 U.S. 405, 416-17 (1975). As this Court has stated in another context, "the remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971); *Minnesota State Senate v. Reems*, 406 U.S. 187, 199 (1972). As put in *Swann*, although "a district court's equitable powers to remedy past wrongs is broad," 402 U.S. at 15, "it must be recognized that there are limits . . . as to how far a court may go." *Id.* at 28. Moreover, the equity court must inevitably be concerned with "adjusting or reconciling public and private needs . . . in shaping its remedies." *Brown II*, 349 U.S. at 299-300. And the relief should also be tailored "taking into account the practicalities of the local situation." *Davis v. Bd. of School Comm'rs*, 402 U.S. 33, 37 (1971).

Second, in shaping State and local defendants' joint participation in relief, the lower courts were solicitous of State policy and practice concerning the local administration of public schools, general supervision of education by State school authorities, and the joint allocation of costs for local school operations between federal, state, and local revenues. Thus, for example, the Court of Appeals modified the district court's initial order (PA 1a) requiring the State defendants to acquire buses in order to conform with State practice so that the Detroit Board would purchase, own, and operate the buses and the State defendants would reimburse the Detroit Board for 75% of the cost (PA 3a-5a). Pursuant to the practice of State-level supervision, the district court made the State defendants directly responsible for the operation and costs of services to monitor implementation of relief (PA 85a, 148a). And the relief hammered out between the State and local defendants with respect to magnet vocational centers followed federal, state, and local policy as a consequence of the district court's "encouragement" (PA 119a). There was *no* attempt by the courts below to restructure the traditional methods of administering, supervising, and financing public education in the Detroit School District under the guise of providing complete relief from the *de jure* segregation found. Thus, equitable considerations inhering in "principles of federalism" were followed in shaping relief. *Cf. Hills v. Gautreaux*, 425 U.S. 284, 293-300 (1976).

Finally, that portion of the decree requiring State and local defendants together to share in the cost burdens of implementing four aspects of ancillary relief causes the State defendants, and the Detroit Board, to bear no more than their fair share of the costs of remedying their wrongs. In fairly apportioning these costs, the decree expressly limits the State defendants' participation to the "excess costs" beyond any pre-existing local expenditure;

this insures that the State defendants' "fair share of the costs" will be limited to the actual costs of the ancillary relief ordered rather than inadvertently include payment for any other local programs or operations. (PA 146a-147a.) Such a decree constitutes no blank check to be drawn on the State treasury at will for educational operations generally or desegregation relief particularly.

In imposing on the State defendants a share of the costs of implementation, the decree also took into account somewhat the relative resources available to the State and local defendants. The gravamen of the proof on this "resource" issue was not that there was a State school financing violation as considered by this Court in *Rodriguez*. As plaintiffs have repeatedly made clear, this is a case of hard core racial discrimination, *de jure* school segregation, not a school finance case. But the record did amply demonstrate and both District Judges Roth and DeMascio made findings (*e.g.*, 338 F. Supp. at 589; PA 37a-41a, 58a), affirmed by the Court of Appeals (484 F.2d at 238-42; PA 179a-180a), that:

1. The Detroit School District has been on the verge of bankruptcy compared to the relatively dynamic State School Aid fund (whose warrants and checks are issued under the authority of State Petitioners, MSA 3.140(1), 15.1919 (517)).
2. The Detroit Board was not malingering in its effort to raise money and suffered from relatively severe limitations on its ability to raise additional money locally.
3. The State, by a series of specific actions (historic discrimination in the authority granted for school bonding, reimbursement of transportation costs, and computing state aid) "created and perpetuated systematic educational inequalities," 338 F. Supp. at 589, which further served to stigmatize plaintiffs' schooling as the state education system's undeserving, black stepchild.

The relevance of such findings for this Court's present review is not that they make out an independent constitutional violation (although they may very well). Rather, they are factors which the chancellor may properly consider in apportioning the cost burdens of remedy for other violations between two sets of wrongdoers over which he unquestionably has the constitutional power to order either wrongdoer alone to provide relief.

An alternative to requiring the State defendants to share in the burdens of implementing relief with the local defendants is to enjoin one of the two parties to bear the total burden of the ancillary relief. But that choice would, of course, allow one set of defendants to avoid sharing in the burdens of remedying its own violation contrary both to the nature of the violation and to the State policy of sharing the responsibility for public education in Michigan between local school districts and the State and its responsible State officials. The other alternative would be to require each set of defendants to implement alone separate aspects of ancillary relief; but that would require some departure from the State policy and practice of local administration of schools.

Given these circumstances, and the alternatives available, the judgment below neither exceeds the equitable authority nor constitutes an abuse of the equitable discretion vested in the courts below to injoin the State and local defendants to provide necessary prospective relief from the *de jure* segregation violation and its effects.

The Court of Appeals thoroughly reviewed the ancillary relief ordered as measured against the rights and interests at stake and the record evidence. *Cf. Brown II*, 349 U.S. at 299-301. In our view, the Court of Appeals properly held that there had been no abuse of discretion in the nature and kind of ancillary relief ordered to implement plaintiffs' right to attend a racially non-

discriminatory school district as free as possible of the present effects of the prior and continuing *de jure* discrimination. Thus, the Court of Appeals' judgment represents "the principled application of standards consistent" with the rights and interests at stake, even if some of the district court's other rulings and its mode of proceeding (*see* Statement, *supra*, pp. 12-13) resemble the "chancellor's foot." *Albemarle Paper Co. v. Moody*, *supra*, 402 U.S. at 417.³¹

³¹ The State defendants made no claim in the Court of Appeals of prejudice in the district judge's extraordinary method of proceeding (*see*, note 9 and page 13, *supra*) *ex parte* without transcription and thereby limiting the record on the details, total cost, and allocation of costs for ancillary relief. For that reason, the Court of Appeals was correct in affirming the judgment of the district court. Similarly, the State defendants make no claim of error or prejudice in this Court on these procedural grounds. *Cf. State Petitioners' Brief* at 11 n.7. That may be because the State defendants have a basis independent of the record for knowing that the actual costs previously assessed are directly related to ancillary relief appropriate under the standards described in this brief; this may be particularly true since the actual costs of implementing ancillary relief over the past year may be known to them. However, if State defendants do now challenge on some evidentiary basis the amount or the allocation of the costs assessed, remand pursuant to this Court's "plain error" rule, 40 (1)(d)(2), may be appropriate to insure that State defendants have the opportunity to contest and to make a record to insure that they bear only their fair share of the actual costs of implementing ancillary relief, pursuant to the controlling constitutional and equitable principles.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs and Respondents Ronald Bradley, et al., pray that the judgment of the Court of Appeals on ancillary relief be affirmed.

Dated: January 28, 1977.

Respectfully submitted,

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APPENDICES

APPENDIX A

**OUTLINE OF ALTERNATIVE ARGUMENTS ON THE
IMPACT OF THE FOURTEENTH AMENDMENT AND
ENSUING RECONSTRUCTION LEGISLATION ON
STATE SOVEREIGNTY.**

Following, in outline form, are several arguments, alternative to Arguments III A and III B in the text of this brief, which also require rejection of the State Petitioners' sovereign immunity claims. In our view it is not necessary to reach these questions in this case because our other arguments are dispositive. Should the Court reject the sovereignty analyses presented in the main Arguments III A and B, however, it would then be necessary for the Court to consider the questions raised in Argument III C. In that circumstance, this outline will be in need of considerable fleshing out, and we have accordingly requested (*see* pp. 43-44, *supra*) the opportunity for full-fledged rebriefing or remand to the Court of Appeals for its initial consideration of these issues.

1. As a threshold matter, the reach of the eleventh amendment does not extend to federal-question claims against the states. The purpose of the eleventh amendment was to restore the original understanding of the "diversity" clause of Article III, as understood by Justice Iredell in his dissent in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and not to withdraw federal judicial power over federal-question claims against the states. The contrary interpretation arrived at in *Hans v. Louisiana*, 134 U.S. 1 (1890), is mistaken. Hence, wherever Congress has, in the exercise of its Article III prerogatives, conferred federal-court jurisdiction over federal-question disputes, the states are subject to suit for a full measure of relief unless the jurisdictional grant provides otherwise. (These points are persuasively made in the

Brief *Amici Curiae* for the Lawyers' Committee for Civil Rights Under Law, et al., filed last Term in No. 75-251, *Fitzpatrick v. Bitzer*.)

Here the district court's jurisdiction was initially invoked pursuant to 28 U.S.C. §§ 1343 and 1331, among other provisions, and the existence of subject-matter jurisdiction with respect to plaintiffs' fourteenth amendment claims has never been in dispute. The eleventh amendment is therefore inapplicable to this case.

2. Even if point 1 is in error in asserting the general proposition that *all* federal-question claims against the states are not within the purview of the eleventh amendment, it is nevertheless correct insofar as the proposition pertains to federal-question claims arising under the fourteenth amendment. By their very terms, "the substantive provisions of the Fourteenth Amendment . . . themselves embody significant limitations on state authority." *Fitzpatrick v. Bitzer*, 49 L.Ed.2d 614, 621 (1976); see also *Ex parte Virginia*, 100 U.S. 339, 345-48 (1880). Moreover, the fourteenth amendment "is undoubtedly self-executing without any ancillary legislation so far as its terms are applicable to any existing set of circumstances." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); accord, *Monroe v. Pape*, 365 U.S. 167, 198 (1961) (Harlan, J., concurring); B. SCHWARTZ, 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 215 (1970). "[T]he Fourteenth Amendment plainly prohibits a State itself from discriminating because of race." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169 (1970).

Thus, of its own force the supervening fourteenth amendment circumscribes the reach of the eleventh. If there is subject-matter jurisdiction in the federal courts, as there is in this case, therefore, the violation of vested fourteenth amendment rights may be fully remedied with-

out regard to the subordinate provisions of the eleventh amendment.

3. In *Fitzpatrick v. Bitzer*, *supra*, this Court held that Congress had the power, conferred by § 5 of the fourteenth amendment, to enact enforcing legislation overriding the eleventh amendment immunity of the states. The Court plainly did not (and did not need to) reach the question, discussed in point 2, *supra*, as to whether the fourteenth amendment by its own terms limits the scope of immunity afforded by the eleventh amendment. Yet some lower federal courts have construed *Fitzpatrick* as requiring the existence of congressional action pursuant to § 5 as a precondition to the express terms of the fourteenth amendment being allowed to carry the day against a claim of eleventh amendment immunity. See, e.g., *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), petition for cert. pending, No. 76-832. We do not agree to that proposition, for reasons outlined in point 2, above. But even if the proposition is correct, such § 5 congressional authorization is manifestly present in the instant case.

In addition to the Equal Educational Opportunities Act of 1974 (discussed in the main text at pp. 38-41), such authorization is present in § 1 of the Civil Rights (or Ku Klux) Act of April 20, 1871, 17 Stat. 13 (now codified as 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983), and in the Judiciary Act of March 3, 1875, 18 Stat. 470 (now 28 U.S.C. § 1331), conferring general federal-question subject-matter jurisdiction on the federal courts limited only by a minimum jurisdictional-amount requirement. We shall outline these two latter points *seriatim*.

a. Section 1 of the Civil Rights Act of 1871 plainly constitutes legislation under § 5 of the fourteenth amendment to enforce the substantive provisions thereof. The

title of the Act so states (17 Stat. 13), and this Court has recognized that the Act "was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." *Monroe v. Pape*, 365 U.S. 167, 171 (1961). The cause-of-action part of the 1871 Act (now 42 U.S.C. § 1983) subjects "[e]very person who, under color of" state law deprives another of fourteenth amendment rights, for example, to liability "in an action at law, suit in equity, or other proper proceeding for redress." And the jurisdictional part (28 U.S.C. § 1343 (3)) confers jurisdiction on the federal courts co-extensive with the authorized cause of action. See *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974). Whoever may come within the ultimate coverage of this Act (*cf. Adickes v. S. H. Kress & Co.*, *supra*), it is clear that "state officials" (*id.* at 167 and 168) are a primary target.

This would be enough to demonstrate that the state officials who are petitioners here have been subjected to suit under § 5 legislation, and thereby stripped of their eleventh amendment immunity in this case, were it not for the following *dictum* in *Fitzpatrick v. Bitzer*, *supra*, 49 L.Ed.2d at 619 (emphasis added):

We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; *that being the case, it could not have been intended to include States as parties defendant.*

If the italicized portion of this quotation is construed to mean that state officials, acting in their official capacities (the situation in *Edelman*), are not subject to

suit for a full measure of relief under § 1983, then we respectfully submit that the *dictum* is wrong.

We recognize the possible need for reconsideration of *Edelman's* treatment (415 U.S. at 674-75) of § 1983 in light of *Fitzpatrick*, but the answer to this dilemma is not found in the *Monroe v. Pape* holding that municipalities are not suable "persons" under § 1983.* Whether or not *Monroe's* holding in that respect is correct (and it has been much criticized), it simply cannot be extended to state-level officials. The determination that cities and counties are not § 1983 persons was based on *Monroe's* analysis (365 U.S. at 187-92) of the circumstances surrounding rejection by the Forty-Second Congress of an amendment (and a subsequent revised version) to the 1871 Act proposed by Senator Sherman of Ohio. He proposed to impose liability upon any "county, city or parish" for property damages and personal injuries caused by "any persons riotously and tumultuously assembled together" (*id.* at 188 nn. 38 and 41) even if neither the county, city, or parish nor its em-

* The *Fitzpatrick* explanation for *Edelman's* handling of § 1983 is made more difficult to comprehend by reason of the Court's own treatment of the § 1983 "person" problem as a mandatory jurisdictional inquiry. *Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4079, 4080-81 (U.S. Jan. 11, 1977); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). If the basis of the decision in *Edelman* was truly a determination that the suit against the official-capacity state officials was in fact a suit against the state which "could not have been intended" by § 1983 to be a suable party (*Fitzpatrick*, 49 L.Ed.2d at 619), then the court was without jurisdiction to render its decision on the eleventh amendment and should have vacated and remanded as in *City of Kenosha v. Bruno*, *supra*. (In our view, however, assertions of "non-personhood," which require interpretation of the cause-of-action provision (§ 1983) rather than the jurisdictional grant (§ 1343(3)), ought to be treated as waivable affirmative defenses, not as defects in subject-matter jurisdiction, *cf. Bell v. Hood*, 327 U.S. 678 (1946); or, at most, the problem should be treated as a limitation on jurisdiction over the person, which is also waived if not raised in the trial court, *cf. Rule 12(h)(1)*, F.R. Crv. P.).

ployees were in any way responsible for the damages and injuries caused by such persons.

The circumstances surrounding rejection of the Sherman amendment are *sui generis*; and we do not believe that a full review of the 1871 Act's legislative history will provide any support for the proposition that a state official, acting in his official capacity as the state (i.e., when "he acts in the name and for the State, and is clothed with the State's power, his act is that of the State," *Ex parte Virginia*, *supra*, 100 U.S. at 347), is exempt from § 1983's coverage. Indeed, as the principal issue resolved in *Monroe* (365 U.S. at 171-88; *see also id.* at 192-202 (Harlan, J., concurring)) demonstrates, § 1983 applies to all officers of the state, whether they are acting in their individual or in their official capacities; and Justice Frankfurter was of the dissenting view (*id.* at 202-59) that the statute applied only to the latter category of officials.

A better and more supportable rationalization for the apparent tension between *Edelman* and *Fitzpatrick*, we would therefore suggest, is that the § 1983 cause of action in *Edelman* was for a violation of the Social Security Act, which the Court concluded did not constitute a diminution of the state's eleventh amendment immunity, whereas the cause of action in *Fitzpatrick* (Title VII), like the § 1983 claim in the instant case, was predicated on the fourteenth amendment, which itself embodies limitations on state authority.*

b. Finally, if § 1983 fails the test of § 5 enforcement legislation by being construed as inapplicable to

* Although more supportable, even this explanation may not be justified if, for example, Congress has the power under § 5 of the fourteenth amendment to vindicate the Social Security Act in the federal courts via § 1983. *See Blue v. Craig*, *supra*. In that event, *Fitzpatrick* would require full reconsideration of *Edelman*, in an appropriate case.

persons like state officials, the federal-question jurisdictional statute most surely passes. 28 U.S.C. § 1331 is not encumbered with a "person" limitation. Subject only to the jurisdictional-amount requirement (which is not in dispute here, *cf. Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4079 (U.S. Jan. 11, 1977)), the statute confers judicial power to decide fourteenth amendment claims such as those presented in this case, where the existence and validity of plaintiffs' fourteenth amendment cause of action is not contested. *Cf. Mt. Healthy City School Dist.*, *supra*. Section 1331 was passed in 1875 and "was, like the Act of 1871, an expansion of national authority over matters that, before the Civil War, had been left to the States." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 548 (1972). It "has been regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states'" (*id.* at 548 n.14); as "'clearly . . . part of rather than an exception to, the trend of [Reconstruction] Legislation which preceded it.'" *Id.* at 548. *See also Steffel v. Thompson*, 415 U.S. 452, 463-64 (1974); *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Mitchum v. Foster*, 408 U.S. 225 (1971); *Zwickler v. Koota*, 389 U.S. 241, 246-47 (1967). Section 1331 was thus the final part of the Reconstruction package designed to place the protection of individual federal rights guaranteed by the fourteenth amendment, *inter alia*, in the hands of the federal judiciary. Since a grant of jurisdiction "is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws" (*Strauder v. West Virginia*, 100 U.S. 303, 311 (1880); *see also Civil Rights Cases*, *supra*, 109 U.S. at 12), § 1331 clearly embodies any necessary congressional authorization under § 5 of the fourteenth amendment. *Cf. Usery v. Allegheny County Institution Dist.*, No.

76-1079 (3d Cir. Oct. 28, 1976). Especially is this so in connection with claims arising under the fourteenth amendment, which, to the extent of its terms, is self-executing (*see* point 2, *supra*).

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitutional Provisions

Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 11:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 14:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutory Provisions

20 U.S.C. § 1601. Congressional findings and purpose

(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving

the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

(b) The purpose of this chapter is to provide financial assistance—

(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. § 1606. Authorized activities—Programs and projects

(a) Financial assistance under this chapter (except as provided by sections 1607, 1608, and 1610 of this title) shall be available for programs and projects which would not otherwise be funded and which involve activities designed to carry out the purpose of this chapter stated in section 1610(b) of this title:

SPECIAL REMEDIAL SERVICES

(1) Remedial services, beyond those provided under the regular school program conducted by the local educational agency, including student to student tutoring, to meet the special needs of children (including gifted and talented children) in schools which are affected by a plan or activity described in section 1605 of this title or a program described in section 1607 of this title, when such services are

deemed necessary to the success of such plan, activity, or program.

PROFESSIONAL STAFF

(2) The provision of additional professional or other staff members (including staff members specially trained in problems incident to desegregation or the elimination, reduction, or prevention of minority group isolation) and the training and retraining of staff for such schools.

TEACHER AIDES

(3) Recruiting, hiring, and training of teacher aides, provided that in recruiting teacher aides, preference shall be given to parents of children attending schools assisted under this chapter.

INSERVICE TEACHER TRAINING

(4) Inservice teacher training designed to enhance the success of schools assisted under this chapter through contracts with institutions of higher education, or other institutions, agencies, and organizations individually determined by the Assistant Secretary to have special competence for such purpose.

COUNSELING

(5) Comprehensive guidance, counseling, and other personal services for such children.

NEW CURRICULA; MINORITY LANGUAGE

(6) The development and use of new curricula and instructional methods, practices, and techniques (and the acquisition of instructional materials relating thereto) to support a program of instruction

for children from all racial, ethnic, and economic backgrounds, including instruction in the language and cultural heritage of minority groups.

CAREER EDUCATION

(7) Educational programs using shared facilities for career education and other specialized activities.

INNOVATIVE INTERRACIAL PROGRAMS

(8) Innovative interracial educational programs or projects involving the joint participation of minority group children and other children attending different schools, including extracurricular activities and cooperative exchanges or other arrangements between schools within the same or different school districts.

COMMUNITY ACTIVITIES

(9) Community activities, including public information efforts, in support of a plan, program, project, or activity described in this chapter.

ADMINISTRATIVE SERVICES

(10) Administrative and auxiliary services to facilitate the success of the program, project, or activity.

PLANNING AND EVALUATION

(11) Planning programs, projects, or activities under this chapter, the evaluation of such programs, projects, or activities, and dissemination of information with respect to such programs, projects, or activities.

FACILITY REMODELING; MOBILE UNITS

(12) Repair or minor remodeling or alteration of existing school facilities (including the acquisition, installation, modernization, or replacement of instructional equipment) and the lease or purchase of mobile classroom units or other mobile education facilities.

20 U.S.C. § 1702:

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

20 U.S.C. § 1703:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

* * *

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1706:

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

20 U.S.C. § 1708:

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title.

20 U.S.C. § 1720:

For the purposes of this subchapter—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 881 (k) of this title.

28 U.S.C. § 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000c-2:

The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, including making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel

of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

42 U.S.C. § 2000c-4:

(a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of—

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

Regulatory Provisions

45 C.F.R. § 180.12:

Funds made available pursuant to this subpart shall be used for the activities described in paragraph (a) of this section and for one or more of the activities described in paragraphs (b) through (i) of this section, when such activities are requested in accordance with § 180.11(a).

(a) Planning and other activities designed to insure that administrators, teachers, and other educational personnel are not demoted or dismissed on the basis of race, color, religion, sex or national origin in the process of, or as a result of, desegregation;

(b) Assessment of desegregation-related educational needs in one or more public schools;

(c) Development of administrative methods and techniques to cope with special educational problems occasioned by desegregation;

(d) Development of educational programs, materials, and methods for use in desegregated classroom situations;

(e) Training of administrators, teachers, or other public school personnel in the implementation or use of methods, techniques, programs, and materials designed to cope with special educational problems occasioned by desegregation;

(f) Development of techniques for communications or interaction between public schools or school systems and the groups affected by the desegregation of such schools or school systems;

(g) Technical assistance to public school administrative staffs in determining the availability and appropriate utilization of funds under other Federal and State programs which would assist in coping with special educational problems occasioned by desegregation;

(h) Training of administrative staffs (in school districts which are required to desegregate their schools pursuant to a final order of a court of the United States, a State court, or a State agency or official or pursuant to a plan or assurance required by the Secretary) in efficient and educationally sound methods of assigning students to and within public schools;

(i) Any other activity which the Commissioner determines will make substantial progress toward achieving the purposes of this subpart.

45 C.F.R. § 180.31:

Any institution of higher education may apply for a grant pursuant to this subpart for the operation of short term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel (including school board members or trustees) to deal effectively with special educational problems occasioned by desegregation. An institute may focus only on desegregation on the basis of race, color, religion, or national origin, only on desegregation on the basis of sex, or on both of these types of desegregation.

45 C.F.R. § 180.41:

Any school board may make application pursuant to this subpart for a grant to pay, in whole or in part, the cost of employing a specialist to advise in problems incident to desegregation, and of giving to teachers and other public school personnel inservice training in dealing with problems incident to desegregation. An application may focus only on desegregation on the basis of race, color, religion, or national origin, only on desegregation on the basis of sex, or on both of these types of desegregation.

45 C.F.R. § 185.01:

Programs, projects, or activities assisted under the Act shall be for the purpose of achieving one or more of the following objectives:

(a) Meeting the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

(b) Eliminating, reducing, or preventing minority group isolation in elementary and secondary schools with substantial proportions of minority group students;

(c) Aiding school children in overcoming the educational disadvantages of minority group isolation.

45 C.F.R. § 185.12:

(a) The following activities are authorized to be carried out with financial assistance made available under this subpart when such activities would not otherwise be funded and are designed to carry out the purposes described in § 185.01. Such activities shall be directly related to, and necessary to, the implementation of a plan or project described in § 185.11:

(1) Remedial services, beyond those provided under the regular school program conducted by the local educational agency, including student to student tutoring, to meet the special needs of children (including gifted and talented children) in schools which are affected by a plan or project described in § 185.11, when such services are deemed necessary to the success of such plan or project:

(2) The provision of additional professional or other staff members (including staff members specially trained in problems incident to desegregation or the elimination, reduction, or prevention of minority group isolation) and the training and retraining of staff for such schools;

(3) Recruiting, hiring, and training of teacher aides;

(4) Inservice teacher training designed to enhance the success of schools assisted under the Act through contracts with institutions of higher education, or other institutions, agencies, and organizations individually determined by the Assistant Secretary to have special competence for such purpose;

(5) Comprehensive guidance, counseling, and other personal services for children in schools affected by a plan or project described in § 185.11;

(6) The development and use of new curricula and instructional methods, practices, and techniques (and the

acquisition of instructional materials relating thereto) to support a program of instruction for children from all racial, ethnic, and economic backgrounds, including instruction in the language and cultural heritage of minority groups;

(7) Educational programs using shared facilities for career education and other specialized activities;

(8) Innovative interracial educational programs or projects involving the joint participation of minority group children and other children attending different schools, including extracurricular activities and cooperative exchanges or other arrangements between schools within the same or different school districts;

(9) Community activities, including public information efforts in support of a plan, program, project, or activity described in the Act;

(10) Administrative and auxiliary services to facilitate the success of the program, project, or activity assisted under this subpart;

(11) Planning programs, projects, or activities assisted under this subpart, the evaluation of such programs, projects, or activities, and dissemination of information with respect to such programs, projects, or activities;

(12) Repair or minor remodeling, or alteration of existing school facilities (including the acquisition, installation, modernization, or replacement of instructional equipment) and the lease or purchase of mobile classroom units or other mobile education facilities.

(Public Law 92-318, sections 702(b), 707(a))

(b) The activities authorized under paragraphs (a) (10) and (11) of this section shall be assisted only as part of, and in conjunction with, a comprehensive educa-

tional program, project, or activity designed to carry out the purposes described in § 185.01.

(Public Law 92-318, sections 702(b), 707(a))

(c) Applications by local educational agencies for assistance under this subpart shall include an assurance that in the case of a proposed program or project which includes activities authorized under paragraph (a) (3) of this section, preference in recruiting and hiring teacher aides shall be given to parents of children attending schools assisted under the Act.

(Public Law 92-318, section 707(a) (3))

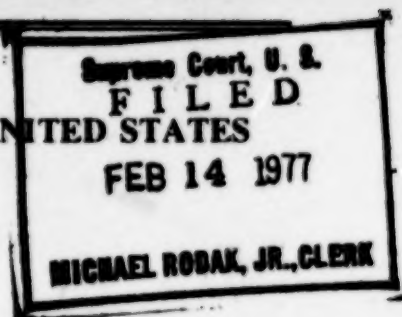
(d) The term "repair or minor remodeling or alteration," for purposes of paragraph (a) (12) of this section, means the making over or remaking, in a previously complete building or facility, of space used or to be used for activities otherwise authorized by this section, where such making over or remaking is necessary for effective use of such space for such purpose and where no other space is available for such use. The term does not include building construction, structural alterations to buildings, building maintenance, or general or large-scale renovation of existing buildings or facilities. In no case may more than 10 percent of the amount made available to the applicant under this subpart be used for activities authorized under paragraph (a) (12) of this section.

(Public Law 92-318, section 707(a) (12))

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447



WILLIAM G. MILLIKEN, et al.,

Petitioners,

v.

RONALD G. BRADLEY, et al.,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**BRIEF OF RESPONDENT
BOARD OF EDUCATION FOR THE
SCHOOL DISTRICT OF THE CITY OF DETROIT**

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al.,
Petitioners,

v.

RONALD G. BRADLEY, et al.,
Respondents.

**On Writ of Certiorari to the United States
 Court of Appeals for the Sixth Circuit**

**BRIEF OF RESPONDENT
 BOARD OF EDUCATION FOR THE
 SCHOOL DISTRICT OF THE CITY OF DETROIT**

**COUNTER STATEMENT
 OF
 QUESTIONS PRESENTED**

I

Was the inclusion of remedial programs in reading, in-service training, testing, and counseling and guidance in the Detroit desegregation plan within the power of equity, when overwhelming record evidence establishes that they are essential in Detroit to eliminate all vestiges of segregation and overcome obstacles to desegregation?

II

Where the State Defendants have been adjudicated to have violated the Fourteenth Amendment rights of Detroit school children, may the Tenth Amendment be invoked as a bar to remedying this constitutional violation?

III

Does the Eleventh Amendment or decisions of this Court prevent federal equity jurisdiction from ordering State Defendants, who have been found guilty of *de jure* segregation, to finance part of the implementation of a desegregation plan?

IV

When the District Court orders State Defendants to assist in remedying constitutional violations they have caused, can state laws hinder the implementation of that remedy?

V

When the District Court allocated the remedy between joint wrongdoers, was it proper to consider the pervasive State control of education and the critical financial condition of the Detroit Board?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Explanatory Note

Herein, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the page number, e.g., (A 12).

Appendix of Respondent, "AR" followed by the page number, e.g., (AR 12ar).

Record of the Remedy Hearings, "RR" followed by the volume number and the page number, e.g., (RR I 12).

Record of the Violations Hearings, "RV" followed by the volume number or date and the page number, e.g., (RV I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec. 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

Exhibits introduced in depositions, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education and F for Detroit Federation of Teachers, followed by "Dep", followed by the last name of the individual deposed, followed by an "X" and the number of the exhibit, e.g., (P Dep Johnson X 5).

COUNTER STATEMENT OF THE CASE

This is a school desegregation case in the fifth largest school district in the United States (Detroit, Michigan), which has an enrollment of approximately 236,000 students, 79.2% black and 20.5% white. The issues raised by the State Defendants pertain to the remedy and ignore the history of this litigation.

In the late 1960's the Detroit Board adopted two policies designed to desegregate Detroit schools. First, students transferred from overcrowded schools were to be assigned to the nearest school that would improve the racial mix. (Drachler Deposition *de bene esse*, 46, 49-51). Second, students seeking a transfer to another school under the open enrollment program, could only do so if the racial mix could be improved at the receiving school. (Drachler Deposition *de bene esse*, 151). In addition, on April 7, 1970, the Detroit Board adopted a plan to revise attendance zones of high schools which would have resulted in the further desegregation of the school system.

The State Legislature promptly responded by passing Act 48 of the Public Acts of 1970 on July 7, 1970. This Act suspended implementation of the April 7, 1970 desegregation plan. Act 48 also thwarted the two aforementioned existing desegregation policies of the Detroit Board. Section 12 gave a priority to students residing nearest a school, when school officials sought to transfer students to alleviate overcrowded conditions, or when a student sought to transfer to a school to participate in vocationally oriented courses or other specialized curriculum. No longer was it possible for the Detroit Board to channel these transfers in a manner which would improve the racial mix.

Act 48 precipitated the commencement of this action on August 18, 1970. A complaint was filed by individual black and white children and their parents, and the Detroit Branch of the NAACP against the Governor of the State of Michigan, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction, the Board of Education of the City of Detroit, its members, and the then Superintendent of Schools. The Treasurer of the State of Michigan was subsequently added as a Defendant. The complaint alleged that the

Detroit public school system was segregated on the basis of race resulting from the actions and policies of the State Defendants and the Detroit Board.

The Plaintiffs' complaint further alleged a denial of "equal educational opportunities". The Plaintiffs requested relief which included the following:

f. Enter a decree enjoining defendants, their agents, employees and successors from approving budgets, making available funds, approving employment and construction contracts, locating schools or school additions geographically, and *approving policies, curriculum and programs*, which are designed to or have the effect of maintaining, perpetuating or supporting racial segregation in the Detroit school system. (emphasis added)

After trial of the case on the issue of segregation, the District Court held that the Detroit public school system was racially segregated as a result of the unconstitutional practices of both the State Defendants and the Detroit Board. *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971).

The District Court found that the State Defendants committed constitutional violations with respect to the exercise of its general responsibility over supervision of public education. The Court pointed to Act 48 as an example of State conduct intended "to impede, delay and minimize racial integration in Detroit schools". The Court further found that until the 1970 Legislative Session, the State failed to authorize participation by Detroit pupils in transportation aid programs. At the same time, the State supplied mostly white suburbs, many of which neighbored Detroit with the full panoply of State supported transportation. Even after 1970, although Detroit was authorized to participate in a transportation aid program, the State did not allocate any funds to the Detroit school system. *Bradley v. Milliken*, *supra* at 589. Subsequently, the Michigan Legislature further mandated that allocations to the school transportation aid fund were not to be used for desegregation purposes. Mich. Comp. Laws Ann. §388.1179.

The District Court found that the State Board of Education, which exercised control over local school construction, paid no attention to statements and guidelines contained in a "School Plant Planning Handbook", which required the State Board to consider whether selection of school sites would result in racially segregative patterns. The State Board of Education was found to have approved school construction locations that had the dual segregative effect of (1) maintaining segregated school attendance areas and (2) removing majority white feeder schools from almost all black attendance areas. *Bradley v. Milliken, supra* at 588-89.

The District Court further found that the State Board of Education either tacitly or expressly approved the cross district transportation of black high school students from a neighboring suburban school district, bypassing white Detroit high schools which were under capacity, to a black high school in Detroit. *Bradley v. Milliken, supra* at 593. Finally, as a result of their pervasive supervisory authority and control over local school districts, the State Board of Education and its Superintendent, as well as the other State Defendants, were held responsible for the segregative actions of the Detroit Board. *Bradley v. Milliken, supra* at 593.

These findings of *de jure* acts of segregation by the State Defendants were affirmed by the United States Court of Appeals, *Bradley v. Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973). In *Milliken v. Bradley*, 418 U.S. 717 (1974), this Court remanded the case for formulation of a desegregation plan limited to the boundaries of the City of Detroit. However, this Court, although urged by State Defendants in 1974 to do so, did not set aside the findings made in the violation stage of the proceedings that the State Defendants had committed acts of *de jure* segregation.¹

Upon remand the case was assigned to the Honorable Robert E. DeMascio, who ordered the Plaintiffs and the Detroit Board to submit desegregation plans. The original plan submitted by

¹ In *Hills v. Gautreaux*, 425 U.S. 284, 298 n. 13 (1976) this Court recognized that the State of Michigan had been found in *Milliken v. Bradley*, 418 U.S. 717, 734-35 n. 16 (1974) to have committed constitutional violations contributing to racial segregation in Detroit schools.

the Detroit Board included thirteen educational components in addition to pupil reassignment. The State Board of Education was ordered to submit a critique of the Detroit plan, and approved the inclusion of eight of the proposed components as "deserving of special emphasis" in a desegregation plan. (A 91).

Hearings on the two plans commenced on April 29, 1975, and lasted some thirty-two days, ending on June 16, 1975. Approximately one-half of the testimony at these remedial hearings concerned educational components.

In his opinion, the District Judge rejected a proposed massive bussing plan. He reasoned that because of the large percentage of black pupils enrolled in Detroit schools a transportation plan to achieve a racial mix would produce "negligible desegregative results".² Instead the Court ordered a more realistic bussing plan, and utilized other techniques of desegregation including changing attendance zones, leaving schools untouched that were in stabilizing neighborhoods, ordering magnet schools, and developing a system of city-wide open enrollment schools. Remedial programs in reading, in-service training, testing, and counseling and guidance were an integral part of this carefully devised desegregation plan.

The District Court found that the four components at issue here, reading, in-service training, testing, and counseling and guidance, were remedial programs essential to remedy the effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation. (PA 127a-37a).

These findings of the District Court are amply supported by the testimony of expert witnesses offered by the State Defendants themselves, the Plaintiffs and the Detroit Board. (A28, A33, A38, A51, A54, A55, A58, A60, A62, A85).

² In 1961 the Detroit school system had 285,512 students, 45.8% black, 53.6% white. At the start of this litigation in 1970, the system had 289,457 students, 63.7% black, 34.8% white. In the fall of 1975, the system had 247,774 students, 75.1% black, 22.9% white. By fall 1976, the system had 235,895 students, 79.2% black, 20.5% white.

The State Defendants never objected to the trial court's finding and in fact worked with the Detroit Board in developing the actual programs to be implemented which were then submitted to the Court for approval. Only when they were ordered to pay a part of the cost of implementation did the State Defendants appeal the inclusion of educational programs in the desegregation plan.

These programs cannot be dismissed as expansions of existing programs, but are new programs developed, pursuant to Court order, to eliminate the "vestiges of segregation" in a school system undergoing desegregation and to overcome obstacles to effective desegregation. (PA 127a-37a). The District Court entered various orders approving these submissions and ordering their implementation. (PA 92a-95a, 127a-37a, 146a). The careful development of the educational components clearly demonstrates that the District Court engaged in a thoughtful and deliberate process over an extended period of time to fashion a desegregation program tailored to the desegregation needs of Detroit. (PA 168a-72a).

The Court of Appeals concluded that the findings of the District Court were supported by "ample" record evidence and held that the District Court acted within its equity powers when it included these components as part of the remedy. *Bradley v. Milliken*, 540 F.2d 229 (6th Cir. 1976); (PA 171a).

Pursuant to the May 11, 1976 Order, the District Court required the Detroit Board to submit to the State Board of Education "its highest budget allocated in any year for each of the . . . quality education programs", and thereafter, compute "the excess cost in addition thereto occasioned by the specific implementation of the court-ordered programs". (PA 146a-47a). By this computation the District Court was able to reduce the original estimate and limit the cost to \$11,645,000 Dollars, and require the State Defendants and the Detroit Board to share the responsibility. This figure amounts to approximately \$49.38 per student in Detroit, of which \$24.69 per student is to be paid by the State Defendants.

The State Defendants and the Detroit Board were ordered to share equally in the costs of the educational components as each

was found guilty of causing the segregation in the Detroit schools.

The Detroit Board is beset by serious financial problems, including the adoption of a survival budget in 1971, virtual bankruptcy of the system, an eroding tax base, and constant millage failures. Since August 15, 1975 three millages have failed (two on August 3, 1976, one on November 2, 1976).

The school millage level is slightly below the state average, but the millage levy in addition to all other taxes in Detroit (county, city property, city income, city utility) results in a cumulative tax burden on Detroit taxpayers which is greatly in excess of the state average. (A21-23). The State has recognized this problem by supplying aid to school districts whose municipal tax average is in excess of One Hundred Twenty-Five (125%) Percent of the State average. (A23). Mich. Comp. Laws Ann. § 388.1125. In the last two years the municipal overburden provisions of the School Aid Act, of which Detroit is the primary beneficiary, has never been funded at more than 28% of the maximum funding allowed by the school aid formula. The result is the State of Michigan does not supply the Detroit Board with all the money state law mandates.

Finally, the Governor of Michigan has provided in the Executive Budget for the fiscal year 1977-1978 that the Detroit Board will be required to submit its budget and expenditure data to the Governor through the State Department of Management and Budget for a comprehensive State level review and report to the Governor and the Superintendent of Public Instruction. Based on the Governor's budget message, it does not appear that such limitations will be placed on any other school districts. The State's requirement of budget review is indicative of the pervasive state control, particularly over the Detroit school district.³

The United States Court of Appeals in *Bradley v. Milliken*, 540 F.2d 229, 241-42 (6th Cir. 1976) affirmed the judgment of the

³ See, William G. Milliken, *Executive Budget - Fiscal Year 1977-78*, p. J32; William G. Milliken, *Michigan State of the State Message - January 1977*, p. 40.

District Court requiring State Defendants to share in the cost of the educational components and allocated those costs between the State Defendants and the Detroit Board. In so doing, the Court of Appeals said:

We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have [28] a causal relation to the de jure segregation that exists in Detroit. 540 F.2d at 245; (PA 178a).

The fiscal justification for the decision of the District Court in requiring that the State of Michigan pay one-half of the costs of the desegregation plan (to the extent specified in the orders and judgments) is supported abundantly by the evidence with respect to the critical financial problems now confronting the Detroit Board of Education. 540 F.2d at 246; (PA 179a).

This Court granted the State Defendants Petition for Certiorari.

SUMMARY OF ARGUMENT

This appeal involves the propriety of the District Court's inclusion in the Detroit desegregation plan of a reading program to remedy deficiencies caused by segregation, non-discriminatory testing and guidance and counseling programs, and an in-service training program to sensitize teachers to the needs of black students who have been victims of racial discrimination and to the problems of teaching in a desegregated setting. The District Court found these four remedial programs were necessary to eliminate the effects of past segregation, to make desegregation work and to prevent resegregation.

These findings of the District Court are supported by the evidence and are within the scope of the remedy for segregation. The remedy of desegregation in Detroit must include more than pupil reassignment to correct the inequities and discrimination inherent in the violation of segregation. Once the constitutional violation of segregated schools has been found, it is within the broad flexible power of equity to "eliminate all vestiges of segregation", to overcome obstacles to effective desegregation and prevent resegregation.

The findings of the District Court are amply supported by the testimony of expert witnesses offered by the State Defendants, the Plaintiffs and the Detroit Board. No contradictory evidence was offered.

These new remedial programs cannot be characterized as the kind of "quality education" any school system should have. Nor can they be dismissed as expansions of existing programs. Each is specifically designed to meet the needs of children who have been victims of segregation and to overcome obstacles to effective desegregation. Each program accomplishes in fact the objective for which it was designed.

Because the effects of segregation can and do take many forms, the remedy of desegregation may include more than pupil reassignment. No separate violation in the area of reading, in-service training, testing, or counseling and guidance is necessary for the District Court to include these four programs as part of the remedy for segregation for it is these four educational components that assist in remedying the violation of segregation.

The law of this case is that the State Defendants along with the Detroit Board have been found guilty of *de jure* segregation of the Detroit school system. Therefore, the responsibility for implementing the four educational components necessary to remedy the effects of segregation must be shared by the State Defendants, the joint wrongdoers.

The Tenth Amendment is not an obstacle to the State Defendants' participation in the remedy because they have been found to have caused segregation in Detroit. The order here is designed to remedy a constitutional wrong. It does not interfere with or obstruct the lawful operation of state government.

Nor is the Eleventh Amendment a bar to the State Defendants' participation in the implementation of the remedy. It is well settled that prospective injunctive relief directed toward state officials, which is designed to remedy school segregation, may have a permissible ancillary financial impact on the state treasury. The Eleventh Amendment was never intended to shield the State Defendants from remedying a violation of the subsequently ratified Fourteenth Amendment. In any event, the State Board of Education, by the state statute, has waived the application of the Eleventh Amendment.

State Defendants cannot use state law to frustrate the efforts of a federal court to remedy a constitutional violation. As the Detroit Board must, the State Defendants, the state officials responsible for education in Michigan, must conform their actions and allocate their funds consistent with the constitutional requirement to desegregate the Detroit schools. The State Defendants were not ordered to pay unappropriated funds, but were ordered to implement a remedy for their constitutional violations.

The *Rodriguez* case⁴ and reasoning is not applicable. This is not a suit challenging the state educational finance system, rather this is the remedial phase of a school segregation case involving joint wrongdoers.

⁴ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

The State Defendants, adjudicated wrongdoers, may not escape a remedy for school segregation by arguing that their partial financing of the desegregation plan is in contravention of state law. The remedial order carefully considered the pervasive state control of local education and the fact that the Michigan Supreme Court has consistently held that local school districts are mere agencies of the state. The cost allocation of the remedy is consistent with Michigan's pervasive control of education, the State Defendants' constitutional violation and the critical financial condition of the Detroit school system.

The Detroit school system has been hampered by a declining tax base, inflationary costs which have limited its ability to deliver current educational services, citizens who have the highest municipal tax burden in Michigan and the defeat of ten of the last eleven millage attempts to secure needed additional operating revenue, including three millage defeats in August and November, 1976. On these facts the District Court properly found that the Detroit Board could not bear the entire costs of desegregation because "... the very survival of an already bankrupt school system is at stake."

The educational components at issue here were developed, pursuant to the District Court's guidelines, by the Detroit Board and the State Board of Education over a period of time. The cost of these components is a function of the size of the Detroit system. Based on Detroit's 236,000 students and 12,000 teachers and administrators, the remedial reading component costs \$19.49 a child; in-service training \$204.50 a teacher or administrator; testing \$2.28 a child; and counseling and guidance \$17.16 a child.

As a practical matter, these components cannot be implemented in Detroit without the State Defendants' participation. Without components, the vestiges of segregation in Detroit cannot be eliminated.

ARGUMENT

I.

THE INCLUSION OF REMEDIAL PROGRAMS IN READING, IN-SERVICE TRAINING, TESTING, AND COUNSELING AND GUIDANCE IN DETROIT'S DESEGREGATION PLAN WAS CLEARLY WITHIN THE POWER OF EQUITY BECAUSE OVERWHELMING RECORD EVIDENCE ESTABLISHES THAT THEY ARE ESSENTIAL IN DETROIT TO ELIMINATE ALL VESTIGES OF SEGREGATION AND OVERCOME OBSTACLES TO DESEGREGATION.

Resolution of the issues now on appeal begins and ends with the record. On remand, the District Judge was urged to adopt a massive busing program in Detroit. Instead of doing so, he adopted a more realistic transportation program, and utilized other techniques of desegregation including changing attendance zones, leaving schools untouched that were in stabilizing neighborhoods, ordering magnet schools, and developing a system of city-wide open enrollment schools. Remedial programs in reading, in-service training, testing, and counseling and guidance were an integral part of this carefully devised desegregation plan.

Assisting the Court in developing the overall plan were three court appointed experts: Wilbur J. Cohen, Dean of the University of Michigan School of Education and former Secretary of Health, Education and Welfare; Frances Keppel, former United States Commissioner of Education; and John A. Finger, Professor of Education, Rhode Island College.

It is imperative that this Court understand how the four remedial programs, reading, testing, in-service training, and counseling and guidance came to be included in the Detroit desegregation plan as they were finally ordered by the District Court, what they actually are, and what they are designed to accomplish. The issue in this case is not the abstract question of whether a desegregation plan may include educational components absent a specific finding of a constitutional violation in educational programs. The issue is whether this record supports this District Judge's finding that the programs in question here

are necessary to eliminate all vestiges of segregation, overcome obstacles to effective desegregation and prevent resegregation in Detroit.

Segregation in the Detroit schools, found by the District Court and affirmed by the Court of Appeals and by this Court to have been caused by the State and the Detroit Board, has had many devastating consequences to black students. Unlike the South, where segregation resulted from notorious Jim Crow laws, segregation in Detroit was the result of an evolutionary process, contributed to by both state and local officials, co-defendants herein, which took place over a period of time. Not only did this process result in racial isolation for black children in a large number of schools, but there were other aspects of the process which have left the badges of segregation on these children. Courts have recognized that students attending segregated schools "have long been disadvantaged by the inequities and discrimination inherent in the dual school system". *Plaquemines Parish School Board v. United States*, 415 F.2d 817, 831 (5th Cir. 1969).

As a result of the inequities inherent in segregation, black students in Detroit's predominantly black schools did not receive the same educational benefits as white children in predominantly white schools. Just a few examples of these adverse effects of segregation suffered by many black students are the low achievement test scores (A 6), impaired reading ability (A 6), tracking (A 31, 37), disproportionate representation in special career programs (A 34), and a substantially higher dropout rate (A 51-53).

To eliminate these inherent inequities, these vestiges of school segregation, and to remove obstacles to effective desegregation, the District Court's remedial order provides for special reading programs, testing programs, and counseling and guidance programs. In addition, an in-service training program is included to sensitize school teachers to the needs of black students who have been the victims of such racial discrimination and to the problems of teaching in a desegregated setting.

The inclusion of these programs in Detroit's desegregation plan is entirely consistent with the historical power of equity "to

mould each decree to the necessities of the particular case", *Hecht v. Bowles*, 321 U.S. 329, 330 (1944), and to render a decree which will "eliminate the discriminatory effects of the past as well as bar like discrimination in the future", *Louisiana v. United States*, 380 U.S. 145, 154 (1965), and "eliminate all vestiges of state imposed segregation", *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), "root and branch", *Green v. County School Board of New Kent County*, 391 U.S. 430, 438 (1968).

The State Defendants' argument that the District Court exceeded its remedial powers by including these programs in reading, in-service training, testing, and counseling and career guidance in its plan must fail because these defendants:

- A. Ignored the record support for the programs;
- B. Misrepresented both their content and the function each is designed to perform in the process of remedying the violation of segregation, making desegregation a success and preventing resegregation;
- C. Failed to understand the nature of segregation in Detroit schools, and the purpose of desegregation law; and
- D. Misunderstood the governing remedial principles.

A. RECORD EVIDENCE SUPPORTS THE NEED IN DETROIT FOR REMEDIAL PROGRAMS IN READING, IN-SERVICE TRAINING, TESTING, AND COUNSELING AND GUIDANCE.

Contrary to the assertions of the State Defendants, the District Court did not usurp school board decisions, did not take over management of the Detroit schools, and did not include components in the plan simply to improve the overall quality of education.

The role that components came to play in the Detroit desegregation plan evolved as follows. The original plan submitted by the Detroit Board included thirteen educational components in addition to pupil reassignment. The Court then ordered the

State Defendants to submit a critique of the Detroit Board Plan. (PA 13a). At pages 38 and 39 of its critique, the State approved the inclusion eight of the proposed components as deserving "special emphasis in a desegregation plan".

[W]ithin the context of effectuating a pupil desegregation plan, the in-service training, guidance and counseling, students' rights and responsibilities, school-community relations, parental involvement, curriculum design, multi-ethnic curriculum and co-curricular activities components appear to deserve special emphasis.

The State Defendants were in the forefront of supporting these components to desegregate Detroit schools until the State was required to pay its share of the cost.

Plaintiffs also responded to the Detroit Board's proposed plan by affirming the inclusion of these components to make the desegregation plan work and to eliminate the effects of segregation.

The following record evidence developed in over 76 days of actual trial time (41 days of violation hearings and 35 days of remedial hearings), supports the District Court's finding that remedial programs in reading, in-service training, testing, and counseling and guidance were necessary to eliminate the vestiges of segregation, to overcome obstacles to effective desegregation and to prevent resegregation. Upon review, the Court of Appeals affirmed these findings as "not clearly erroneous, but to the contrary, supported by ample evidence". *Bradley v. Milliken*, 540 F.2d 229, 241 (6th Cir. 1976); (PA 170a).

1. READING.

(a) The Record Evidence.

One of the devastating, adverse consequences of the segregation of Detroit schools, caused by the State and the Detroit Board, which the District Court has sought to eliminate in its remedial order is the unequal reading ability of many black students as compared to the ability of white students. Because of the process of segregation, by the eighth grade, black students in predominantly black schools were on the average of two or more

grade levels behind white students in predominantly white schools as measured by standard achievement test scores. There is absolutely no evidence in the record that such disparity resulted from some inherent inferiority of black children as a group relative to white children. Rather, as a group and on the average black and white children arrive in school with the same potential and much the same levels of tested achievement. Only thereafter, with the experience of school segregation, does this tested achievement disparity appear and grow (A 99-100). Because of these reading deficits, black students did not do well in other areas of education, because the ability to read is a prerequisite to the entire learning process. Consequently, teachers in predominantly black schools came to expect less of their students. This low teacher expectation in predominantly black schools because of the low achievements of their students caused a further deterioration in the black students' desire to learn (AR 18ar, P Dep Johnson X 5 §§ 31, 32; AR 20ar, P Dep Johnson X 6 p 11; AR 17ar, D X MMMM). Thus, failure of black students to read as well as their white counterparts resulted from the process of segregation in Detroit and formed the basis for the generally low achievement level of black students (AR 5ar-6ar, RV IX 1006-07; A 60-62).

The evidence from the remedial record established that a remedial reading program was absolutely essential to remove these vestiges of segregation in order to make desegregation work.

Dr. Robert Green, Dean of the School of Urban Studies, Michigan State University, testified as follows:

I am also well aware of the fact that minority youngsters in a system . . . do lag significantly behind their white counterparts in reading skills . . . Racial segregation is a very key factor in the process . . . When we examined the data for the NAACP here, I believe, two, two and a half years ago, when we had firsthand awareness of that date, there was a significant discrepancy between the general achievements, specifically in the reading area, between black and white youngsters here in the City of Detroit. (A 61).

Plaintiffs' witness, Dr. Michael J. Stolee, now Dean of the School of Education at the University of Wisconsin, re-emphasized the fact that black students who had been victims of discrimination often suffered the greatest difficulty in reading and, because of this fact, many desegregating school systems have concentrated on remedying the reading deficits of their black students. It was the opinion of this expert that a desegregation plan could not be effective without a remedial reading program (A 55).

Dr. Gordon Foster, Director, of the Florida School Desegregation Consulting Center at the University of Miami, emphasized the fact that reading programs are an important aspect in facilitating desegregation. Dr. Foster pointed out the relationship between the ability to read and the ability to test well, he also pointed out some of the teaching and disciplinary problems due to segregation caused reading deficits which surface when actual desegregation begins, and, if left unresolved, prevent any desegregation plan from succeeding. Dr. Foster testified:

But when you throw children, especially at the advanced grades from widely different preparation backgrounds, children of considerably different achievement, teachers are in very dire straits on how to deal with a roomful of children that have very wide achievement ranges. And this is one of the perceptions that they have of being a most difficult problem. It's very obvious that if you have a child, for example, in the 5th or 6th grade who is reading at the 1st and 2nd grade level, that none of the subjects in that grade can he adequately cope with because reading is the foundation for the whole business. (A 56).

* * *

Let me cite a quick example. We have an accepted program with one of the big high schools in Miami which is desegregated, Jackson High School, and they just had a finding that needs assessment which indicates that something like 70 percent of their pupils in the senior high school are reading at maybe the 4th or 5th grade level. Now, obviously, this becomes a very important disciplinary matter because the pupils sit there and they can't do anything. They can't relate to what's going on in the classroom. (A 57).

(b) Decisions Of The Courts Below.

The entire record testimony as to the essential need for a reading program to eliminate the vestiges of segregation in Detroit was brought into focus when the District Court set forth its reasons for including a remedial reading program in the Detroit desegregation plan.

There is no educational component more directly associated with the process of desegregation than reading. Statistical data establish that minority youngsters lag significantly behind their white counterparts in reading skills, which in turn affects the ability of minority students to follow written instructions, succeed on aptitude tests, pass entrance examinations for colleges and universities and compete in the world of arts, sciences, occupations, and skills. Moreover, when such conditions persist, there is a direct effect upon the school environment. Students become disciplinary problems when in reality their problem is directly associated with an inability to conceptualize due to a lack of proper reading and communication skills. As a consequence, teachers and staff assume that such minority students are uneducable, thus further deteriorating the school environment for these students. To eradicate the effects of past discrimination, a remedial reading program should be instituted immediately to correct the deficiencies of those midway in their educational experiences. *Bradley v. Milliken*, 402 F.Supp. 1096, 1138 (E.D. Mich. 1975); (PA 72a).

The Court of Appeals affirmed the inclusion of a reading program in the Detroit desegregation plan, holding that reading programs are "essential to combat the effects of segregation" and necessary to provide the "achievement levels" required to overcome obstacles to desegregation. 540 F.2d at 241; (PA 170a-71a).

2. IN-SERVICE TRAINING.

(a) The Record Evidence.

Another inequity inherent in the process of segregation was that both black and white teachers assigned to predominantly black schools tended to have poor expectations of students

attending those schools (AR 10ar-12ar, RV XXXV 3805-06, 3814; A 38). The record established that in Detroit there is a direct relationship between a student's performance and his teacher's expectations, preceptions, attitudes, and behavior (AR 4ar-7ar, RV IX 988-93, 1033-35; A 38). In fact, the discrepancy of one to two years between black and white student achievement level at the eighth grade was partially the product of low expectations from teachers (AR 1ar-3ar, RV April 6, 1971 53-58) and also the substantial drop-out and truancy rates among black junior high school students attending segregated schools in Detroit (AR 21ar, P Dep Johnson X 6, p 24; A 63).

Dr. Charles Kearney, Associate Superintendent of Research and Administration of the Michigan Department of Education, and the State Defendants' own witness, stated on direct examination that in-service training was necessary to a desegregation plan:

Well, I suspect when one undergoes a desegregation effort that you have the movement of a number of pupils from different areas of the city or different areas of the school districts. And it seems good judgment to prepare teachers, as well as other professional staff who are going to meet these children when they come in the school, to be prepared and ready to work with those children and hopefully end up with a successful experience. (A 88-89).

Dr. Stuart Rankin, Assistant Superintendent for Research for the Detroit school system, explained the need for in-service training in the area of teacher expectations:

If I'm a white teacher who has been—or a black teacher, for that matter, who has been used to working only with black youngsters or only with white youngsters and my experience is limited to that extent and I may have, through my own background, certain prejudices or limitation, or in some other ways may not be as adequate to the job in a newly desegregated school situation as I might otherwise be . . . I am going to need to understand what happens when expectations are communicated to youngsters . . . It is true that . . . the extent to which the teacher communicates to the student that the teacher expects that the student will

learn well is an important variable in how the student feels about how well he is going to learn. And in turn, that is an important factor in how well he does indeed learn. (A 38).

Dr. Michael J. Stolee, Plaintiffs' witness, testified:

In my opinion, the most important single component that's in there is the section on in-service training. I have read the back of the document what the School Board has had to say, and it is my opinion that their statements reflect accurately, as I know it to exist on the national scene and that the program they are presenting makes sense. It would be a good way to handle it. (A 54).

Dr. Kearney, a State witness, Dr. Rankin, a Detroit Board witness, and Plaintiffs' witness, Dr. Stolee, each ranked in-service training as the most important component in the Detroit desegregation plan and essential to the operation of the plan. (Kearney (A 90); Rankin (A 38); Stolee (A 54)).

(b) Decisions Of The Courts Below.

Because record testimony established that an in-service training program is essential to prepare Detroit's faculty and other educational personnel to deal with the experiences that arise in a school system undergoing desegregation and to correct the negative effects on black students of segregation fostered pre-existing bias, lack of cultural understanding and low teacher expectations, the District Court reasoned and concluded:

A comprehensive in-service training program is essential to a system undergoing desegregation . . . All participants in the desegregation process must be prepared to deal with new experiences that inevitably arise . . . It is known that teachers' attitudes toward students are affected by desegregation . . . White and black teachers often have unhealthy expectations of the ability and worth of students of the opposite race. Moreover, it is known that teachers' expectations vary with socio-economic variations among students. These expectations must, through training, be re-oriented to ensure that academic achievement of black students in the

desegregation process is not impeded. A comprehensive in-service training program will ensure that all students are treated equally in the educational process. 402 F.Supp. at 1139; (PA 73a).

In affirming, the Court of Appeals stated:

The need for in-service training of the educational staff . . . is obvious. [In service training] is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. 540 F.2d at 241; (PA 170a).

3. TESTING.

(a) The Record Evidence.

Another consequence of the segregation caused by the State and the Detroit Board is the low achievement test scores of black students as compared to white students which lead to the grouping of black students in what the educational world refers to as tracking (A 35-37, 41-42).

Standardized tests have traditionally been used to measure achievement, and to classify and counsel students. These tests are heavily dependent on strong reading skills (AR 22ar-23ar, P Dep Johnson X 6, p 34-36; A 36, 41-42). These tests are couched in the language and vocabulary of the white middle class. In addition, as a consequence of segregation, black students in Detroit are unfamiliar with the subject matter of the tests. Consequently, testing, as a by-product of segregation, has retarded the progress of black students by tracking, misplacement and undereducating (AR 14ar-16ar, P Dep Drachler June 28, 1971, 113-17; AR 22ar, P Dep Johnson X 6, 31; A36-37, 41-42).

Record evidence supports the need for a revised testing program designed to delimitate these vestiges of segregation and to prevent their continuation.

Dr. Edward Simpkins, Dean of the School of Education at Wayne State University, verified that "we have had tracking systems built into the school systems and testing has been used as a device for segregating and isolating racial groups within the

schools". (A 31). Professor Margaret C. Ashworth, of the Wayne State University School of Education, also confirmed the fact that tests were culturally biased and resulted in the segregation of black children in various educational tracks. (A 36-37).

According to Professor Ashworth, the Detroit Board's testing component was "designed to prevent this type of segregatory effect". (A 37). Dr. Stuart Rankin described the way test procedures will be administered to ensure that new testing procedures will be nondiscriminatory:

[T]hose people who give the tests and those people who interpret the results of those tests, under a desegregated school situation, should have some special training to make certain that the childrens' testing circumstances are just as perfect as they can be, that there is the appropriate readiness for taking the test that gives every advantage that is fair . . . that the test administration is done the way it ought to be. But more importantly that the interpretation and results of these tests are used properly, not to channel kids in a situation where they may be grouped with youngsters who perhaps aren't learning as well or we might get some re-segregation possibly. (A 39-40).

The State's witness, Dr. Charles Kearney, acknowledged that improper testing procedures could have an adverse effect on the desegregation effort:

If test results were inappropriately used to categorize children into special education programs and most of those children happen to be black as a result of that kind of use, yes I think it would have certainly a discriminatory affect and it would have a negative affect, I'm sure on any kind of desegregation plan being implemented. (A 93).

(b) Decisions Of The Courts Below.

To ensure that desegregation will succeed, and to eliminate all vestiges of segregation, the testing program will have two goals: first, to eliminate any cultural bias from the tests themselves; and, second, to make certain that placement decisions based upon test results are no longer discriminatory.

Based upon the above record evidence, the Court recognized these desegregation goals when it wrote:

The Detroit Board and State Board of Education are constitutionally mandated to eliminate all vestiges of discrimination, including discrimination through improper testing. 402 F.Supp. at 1142; (PA 78a).

The Court of Appeals affirmed the District Court's decision stating:

The need for . . . development of non-discriminatory testing is obvious. . . . [Non-discriminatory testing] is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools. 540 F.2d at 241; (PA 170a).

4. COUNSELING AND GUIDANCE.

(a) The Record Evidence.

Another of the adverse consequences of the segregation of Detroit schools, caused by the State Defendants and the Detroit Board, which the District Court has sought to eliminate in its remedial order is the under-representation of black students in technical and vocational training programs and the disproportionately high absenteeism and drop-out rate of black students as compared to white students. (AR 8ar-10ar, RV XXXIII 3603-13, AR 13ar, R November 23, 1970, 70-72; AR 19ar-21ar, P Dep Johnson X 6, pp 15-16, 24; A 34, 59-60, 63).

The remedial record clearly establishes that a counseling and guidance program must focus on correcting these vestiges of segregation and, in addition, help students adjust to the inevitable pressures which develop in the desegregation process.

Charles Wells, Assistant Superintendent of the Detroit Public Schools, testified that the counseling and guidance component was needed to cope with new pressures created by "moving a significant number of students where new peer relationships have to be established to deal with disciplinary problems and to remedy Detroit's high drop-out rate among black children who have been retarded in their educational development by segregation in the Detroit system". (A 51-53).

Mr. Wells also testified that a revised counseling and guidance component must correct the effects of segregation on black children and eradicate previous counseling practices which stereotyped black children and discouraged them from entering into wide varieties of educational and career opportunities. (A 52). Mr. Wells highlighted the previously segregated black students' need for a revised counseling program:

I have gone into some length about the adjustment problems. I think a second area relates to—particularly if we're talking about black students—the problems that are the consequence in many instances of past discrimination and segregation.

Students usually choose pursuits, have an interest in education to the extent that either they or those around them have found those experiences to be to some degree successful in the past. We have many students who are in the black community who cannot look to parents, cannot look to relatives, who have been successful in a number of areas that are now open to trained people. It then becomes necessary for the school system to provide the kind of guidance that can assist the student in making an intelligent choice about a career and give that student some understanding that if he or she prepares himself to be sufficient to meet the qualifications within a particular career, there is the opportunity and possibility for them to exploit that experience in terms of meaningful employment". (RR XXI 153, 154).

Professor Margaret Ashworth graphically described the need for a guidance and counseling program to eliminate the effects of past segregation of black children in the Detroit system and to make certain that counseling and guidance will be nondiscriminatory when she said:

[W]hat we are saying is that in order to correct the inequities for the students and right the wrongs of students that the person has to be retrained and that program has to be revamped . . . but what I am saying is that students have been counseled in or out of certain programs based on their race. If this had not been so the Aero Mechanics would not be 84 per cent white in a school system that is more than 70 per cent black. (A 34).

Professor Ashworth's reference to the Aero-Mechanics High School, a training ground for entry into the aviation industry, being a predominantly white school underscores Mr. Wells' point that there has been a failure in career counseling for black students.

No stronger support for the counseling and guidance component as being necessary in desegregating the Detroit system was given than by the State Defendants' own witness, Dr. Kearney. He testified that a counseling and guidance component was necessary to avoid stereotyping students based on race (A 95), and further stated:

We support the notion of a guidance and counseling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis. (A 88).

(b) Decisions Of The Courts Below.

Based on this record, the District Court recognized that a counseling and guidance component was essential to eliminate "root and branch" all vestiges of segregation in the Detroit school system and to make desegregation work, and in doing so the Court wrote:

School districts undergoing desegregation inevitably place psychological pressures upon the students affected. Counselors are essential to provide solutions to the many problems that result from such pressures. Moreover, the success of the vocational and technical schools created herein depends upon the efforts of counselors whose guidance is essential to students seeking a career. Counselors can accomplish much to shape and guide the academic experiences of students. They assist student self-development training possibilities available in the system. It will be essential that the counselors become fully acquainted with the vocational and technical offerings created herein. 402 F.Supp. at 1143; (PA 81a).

The Court of Appeals affirmed the District Court holding that "... counseling programs are essential to the effort to combat the effects of segregation". 540 F.2d at 241; (PA 170a).

5. INCONSISTENCIES AND MISREPRESENTATIONS OF THE STATE DEFENDANTS.

The schizophrenic argument of the State Defendants is illustrated by the fact that they have supported other components in the desegregation plan which are now in various stages of implementation. The inclusion of these components has never been appealed because the State Defendants were not asked to pay for them. The same rationale which supports the inclusion of programs not appealed by the State Defendants supports the inclusion of the four programs at issue here. It is hard to believe that the State Defendants are serious in suggesting that the reading, testing, in-service training, and counseling and guidance programs are not essential to remedying all vestiges of the past effects of segregation in Detroit and overcoming obstacles to effective desegregation.⁵

The hypocrisy of the State Defendants' appeal of this issue is further highlighted by their attempt to misrepresent to this Court the Plaintiffs' views as to the educational components. Plaintiffs never opposed the inclusion of educational components in the Detroit desegregation plan. At the remedial hearings, the Plaintiffs' two experts, Dr. Stolee and Dr. Foster emphatically supported these components. In addition, the Plaintiffs filed a Brief In Opposition To Petition For Writ of Certiorari. The State Defendants have taken out of context the statement of Dr. Foster that his pupil reassignment plan eliminated the segregation in Detroit and ignored his lengthy testimony as to the need for educational components as part of the plan to desegregate the Detroit school system. (A 55-58).

⁵ The Detroit Board does not understand the import of footnote 8 at page 11 of the States' Brief regarding vocational education. The Detroit Board has attempted in the past to develop a vocational program but was prevented from doing so during the course of this litigation because of the injunction against the construction of any schools. The Detroit Board's frustration was even more keen when, during the period of this litigation it watched the State consistently allocate federal funds for vocational education to school districts which were predominantly white.

B. THE FOUR NEW REMEDIAL PROGRAMS—THEIR RELATIONSHIP TO DESEGREGATION.

The concept of including these specialized remedial programs in a Detroit-only desegregation plan was developed by the Detroit Board and supported by the Plaintiffs and the State Defendants. These programs were not interjected by the Court and imposed upon reluctant school officials. The District Court merely set forth guidelines to be followed in developing each of these programs. Consistent with these guidelines, the detailed plans for the actual programs to be implemented were developed over a period of time by the Detroit Board working in some cases with the State Board of Education, and submitted to the Court for approval and incorporation into Detroit's desegregation plan. The reading program was approved on December 4, 1975, and the in-service training, testing, and counseling and guidance programs on May 11, 1976. (PA 146a).

1. CONTENT AND FUNCTION OF EACH PROGRAM.

(a) Reading.

The new reading program will provide remedial reading instruction to students at the high school level who have reading deficits which developed as a result of the inherent inequities of the segregated conditions in the Detroit schools. The new reading program will also instruct high school teachers how to teach remedial reading, because high school teachers are discipline oriented in their teaching rather than oriented toward reading instruction (A 57). The new reading program will also train middle school teachers in remedial reading techniques to facilitate the assimilation of sixth grade students who will be in middle schools for the first time due to the grade restructuring necessitated by desegregation.

The new reading program will train administrators, teachers, and para-professionals, at all grade levels, in ways to restructure their reading program to overcome segregation caused reading deficits, and to accommodate grade changes and the new pupil mixes resulting from the pupil reassignment program, magnet schools, the new area vocational centers, and city-wide schools. Parents will also be trained in methods with which they can help their children improve their reading and communication skills.

For the first time, trained reading specialists will be assigned to each senior high school. They will do two things. They will provide reading instruction directly to students with reading handicaps which developed as a result of the inequities of the segregated conditions in the Detroit schools. These reading specialists will also help high school teachers, who have never had training in remedial reading instruction, in methods of diagnosing and remedying segregation-caused reading deficits. For the first time, this same kind of instruction given at the high school level will also take place at the middle school level.

At the elementary school level, reading specialists will train elementary school teachers how to identify reading deficits early in a student's academic career, and how to remedy these deficits and thereby prevent the discrepancy between the academic achievement of black and white students at the eighth grade level. Then, all students can work together and progress together in all aspects of the desegregation process.

When the cost of this new remedial reading program is apportioned among Detroit's 236,000 students, the average cost is about \$19.49 a child.

(b) In-Service Training.

The Detroit Public Schools will develop, implement, coordinate and monitor an in-service training program which will meet the unique needs of a school district undergoing desegregation. The program will concentrate its efforts in the areas of teacher expectations, crisis intervention and prevention, ethnic and racial awareness and human relations.

Teachers and other staff will be trained to understand the impact of their expectations on how they plan and teach their courses, and how their expectations effect the performance level of students who have varying racial, cultural and socio-economic backgrounds.

Crisis prevention and intervention programs are needed in a desegregating school system to deal with conflicts which may arise as a result of desegregation in and around the schools which may disrupt the educational programs of those schools. The new in-service training program will instruct staff and

teachers how to identify these potential problems so that hopefully they may be avoided, and how to handle them if they do in fact develop. The aim of the program will be total participation of all teachers and staff and students, and as much participation of parents as it is possible to obtain.

The new in-service training program will bring to students and staff an awareness and appreciation of racial and cultural differences. By so doing, teachers will develop an increased understanding and appreciation of the characteristics of the different racial, cultural and socio-economic groups and come to learn the important strengths of students from each group, and how to combine these in the classroom to achieve a total desegregated learning experience.

The new in-service training program will ensure that teachers, educational staff, students and parents are prepared to deal with the new experiences which inevitably arise as a result of a desegregation plan. Such training programs necessarily are extensive because there are about 12,000 teachers in the Detroit schools.

The cost of the desegregation in-service training program averages about \$204.50 a teacher or administrator. This average cost does not take into account the large number of non-professional staff personnel who will also receive the benefits of this training.

(c) Testing.

Under the new testing program, all tests used in the Detroit schools will be reviewed to ensure that they are non-discriminatory and free of any cultural bias. If any tests are found discriminatory, they will be discontinued and new tests will be selected to replace them. In addition, there will be a re-examination of the use of individual psychological test results to guard against discriminatory placement of any child in any program.

All school staff will receive training in test administration procedures which ensure standardized and non-discriminatory treatment of the students when they are taking the tests. Staff will be trained in the proper interpretation of test results so that tracking will not result, students will not be unnecessarily pre-

cluded from entering particular programs, nor undue weight given to test scores in making judgments about pupil placement. In order to avoid tracking and resegregation, particular emphasis will be placed on instructing those who interpret test scores in the meaning of those scores and the limitations which should be placed on the use of these scores. Those who administer tests will learn the importance of communicating scores and the importance of teachers and counselors communicating their expectations of success to the student.

In addition to the above, the new testing program will provide for the evaluation of test results in order to monitor Detroit's desegregation efforts so that timely information may be developed and utilized by the school administration as to the strengths and weaknesses of the desegregation effort.

When the cost of revising and administering the new testing program is apportioned among Detroit's 236,000 students, the average cost is about \$2.28 a child.

(d) Counseling And Guidance.

Under the new program, counselors will be trained to use the results of the new testing program, and will also receive training in career opportunities. They will then be able to guide each student, according to their own potential, into a rewarding career. Such a counseling program is expected to have a dramatic effect on lowering the high dropout rate among black students in the Detroit school system.

At the high school level, counselors will be relieved of clerical duties so they can devote their efforts to helping children adjust to the pressures of the desegregation process and spend more time with potential dropouts. Thus, counselors can work to ensure that students will be counseled into the magnet schools, area vocational centers and city-wide schools and open up the wide world of new career and educational opportunities for many of Detroit's black students who were denied exposure to such opportunities because of segregation.

A program comparable to that at the high school level will be initiated in the middle schools. It is at this stage of a student's education that the potential dropout develops. Contrary to the misrepresentations of the State Defendants, there will not be one

counselor in every elementary school. The new counseling and guidance program calls for only one counselor for every three elementary schools, because of the need to eradicate the vestiges of segregation at the earliest level. Some elementary school counseling is necessary because of the stresses caused by desegregation and also to expose these children and their parents to the educational opportunities available in magnet schools, at the sixth through eighth grade, and to numerous high school opportunities such as area vocational centers, city-wide schools and Cass Technical High School. The earlier these opportunities are made known to the child, the more successful will be these methods of racially mixing students.

When the cost of the counseling and guidance program is apportioned among Detroit's 236,000 students, the average cost is only \$17.16 a child.

These new remedial programs cannot be characterized as the kind of "quality education" any school system should have. Nor can they be dismissed as expansions of existing programs. Each is specifically designed to meet the needs of children who have been victims of segregation and to overcome obstacles to effective desegregation.

At page 6 of their Brief, the State Defendants imply that these programs are not well documented and their costs excessive. This may be true of the original programs submitted by the Detroit Board on April 1, 1975. However, this is not true of the programs now before this Court for review because they have been developed by the State Board and the Detroit Board working with Wayne State University and other educational agencies, and then scrutinized by the Court and its monitoring commission before adoption and implementation.

2. DETERMINATION OF COST.

To arrive at the 5.8 million dollar figure which the State Defendants claim they should not be required to pay, the Court was equally precise. It ordered the Detroit Board to determine the highest amount spent in any year preceding desegregation on the reading, testing, and counseling and guidance and in-service training programs. The difference between the above figures and

the additional cost of replacing the old pre-desegregation programs with the new programs necessary to desegregate Detroit was \$11,645,000. Payment of this additional cost was divided equally between the two Defendants (PA 146a, 147a). The State Defendants have never questioned the accuracy of this figure, only the requirement that they pay their share.

After the District Court's May 11, 1976 judgment (PA 145a) requiring payment by the State Defendants, they appealed, and for the first time raised the issue of the propriety of components in a desegregation plan. After extensive briefing and a review of the record, the Court of Appeals affirmed the inclusion of these four particular programs in a Detroit desegregation plan as being within the scope of the remedy and supported by ample evidence. 540 F.2d 229, 241; (PA 170a).

3. WRITINGS AND FIELD STUDIES SUPPORT THE NEED FOR REMEDIAL PROGRAMS IN A DESEGREGATION PLAN.

Current writings of educators, psychologists and sociologists, based upon studies and field observations, have reinforced the proposition that a school system undergoing desegregation cannot eliminate the vestiges of segregation "root and branch" unless remedial programs such as reading, in-service training, testing, and counseling and guidance are made a part of the desegregation plan.

For the convenience of the Court a listing of summaries of these current writings is set forth as a compendium to this brief at pages 90-98 hereinafter.

In July, 1976, the Educational Testing Service of Princeton, New Jersey, which is synonymous with educational testing and research in this country today, published two reports of a study entitled, "Conditions and Processes of Effective Desegregation".⁶ Based on field research and surveys, the study recom-

⁶ See G. Forehand, M. Ragosta, and D. Rock, *Conditions and Processes of Effective School Desegregation*. Final Technical Report for U.S. Office of Education Contract OEC-O-73-6341. Princeton, N.J., Educational Testing Service, 1976; G. Forehand and M. Ragosta, *A Handbook For Integrated Schooling*. A report prepared for U.S. Office of Education Contract OEC-O-73-6341. Princeton, N.J., Educational Testing Service, 1976.

mends that, because of the effects of past segregation, and the "dramatic" impact of the "process of desegregation" on education programs,⁷ the reading, testing, in-service training and counseling and guidance components described herein be included as essential components to an effective plan for school desegregation.

The commentators and the Princeton Testing Service's recent field studies unanimously support the finding of the Courts below that educational programs are essential to an effective desegregation plan in Detroit.

C. THE NATURE OF SEGREGATION AND THE PURPOSE OF DESEGREGATION.

When school desegregation law is traced to its origins in *Brown v. Board of Education*, 347 U.S. 483 (1954), one finds that in determining whether a segregated education deprives black children of the equal protection of the laws, the Court stated, "... we must look instead to the effect of segregation itself in public education." *Brown* recognized that segregation is wrong because of the effect it has on the plaintiffs and their education. The basic underlying purpose of *Brown* is that these effects must be removed if the races are to be treated equally.

Seventeen years after *Brown*, this Court noted in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) that the process of desegregation had become more complex as it moved from rural areas to large cities with their many schools and population shifts. 402 U.S. at 14. The *Swann* court then addressed itself to the task of establishing guidelines for district courts to follow as they struggled to develop desegregation plans. The guiding principle was that "... all vestiges of state imposed segregation must be eliminated from the public schools". 402 U.S. at 15. While the central issue in *Swann* was pupil assignment, the Court acknowledged that there are other "aspects" of segregation in addition to student assignment and therefore other aspects to the process of desegregation in addition to pupil reassignment. 402 U.S. at 18.

⁷ See *A Handbook For Integration*, *Ibid* at 4.; also see, pages 73-96 (Reading), 34-35 (Testing), 89-93 (In-Service Training), 53-56 (Counseling and Guidance).

In addition to recognizing that desegregation may be more than pupil assignment in order to eliminate all vestiges of past segregation, the *Swann* court also recognized that pupil reassignment alone may not be enough to counteract the "continuing effects of past school segregation". 402 U.S. at 28.

In *Milliken v. Bradley*, 418 U.S. 717, 746 (1974), this Court again spoke to the scope of the remedy in school desegregation cases:

[B]ut the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

The Court of Appeals for the First Circuit did not construe language used by this Court in the context of excluding school districts from a remedy when they had not committed a violation, as limiting the basic remedial principles evolving in school desegregation law that desegregation plans must remove all vestiges of segregation rather than perpetuate them. As that Court pointed out, restoration is a "complex and widespread process". *Morgan v. Kerrigan*, 530 F.2d 401, 418 (1st Cir. 1976), cert. denied, 96 S.Ct. 2648 (1976).

The State Defendants argue that the only judicial remedy in a school desegregation case is pupil reassignment. Such an argument ignores this Court's position that desegregation must "... restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct". *Milliken v. Bradley*, 418 U.S. at 746, and ignores the recognition in *Swann* that desegregation can be more than pupil reassignment.

By defining the violation as "unlawful pupil assignment practices", the State Defendants attempt to narrow the remedy to pupil reassignment. However, after the violation hearings in Detroit the District Court found that:

[B]oth the State of Michigan and the Detroit Board of Education have committed acts which have been causal

factors in the segregated conditions of the public schools of the City of Detroit. 338 F.Supp. 582, 592 (E.D. Mich. 1971).

Once the violation of segregated conditions has been found, the scope of the remedy properly must include the elimination of all racial discrimination in that school system "root and branch". *Green v. County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968).

Courts have acknowledged that discrimination can and does take many forms. Discrimination in the Detroit schools was not limited to pupil assignments. The proofs in this case established that as a result of segregation black children in Detroit's predominantly black schools did not receive the same educational benefits as white children in predominantly white schools. The reading level of many black children is lower than that of white children. Fewer black children are counseled into special programs, such as the Aero-Mechanics High School, and the dropout rate is substantially higher for black students than white students. Testing procedures have been discriminatory and often resulted in tracking. These facts are evidence of the effects of segregation in Detroit.

The components now in dispute are one part of an equitable remedy designed to eliminate all of the vestiges of segregation. As the conditions these components are designed to correct are inherent in segregation, they are a proper part of the remedy of desegregation. Without them, there can be no effective remedy for the segregation found to exist in Detroit.

D. THE TRADITIONAL RULES OF EQUITY GOVERN DESEGREGATION REMEDIES.

The State Defendants' argument that the only remedy available is pupil reassignment is based on the language in *Swann* and *Milliken* that the nature of the violation determines the scope of the remedy.

Swann simply tells us that while it is within the broad discretionary powers of school authorities to do voluntarily many things to correct segregation in the schools, absent a finding of the constitutional violation of segregation, a federal

court would not have the authority to include them in a desegregation plan. Both the State Defendants and the Detroit Board have been found guilty of violating the constitutional rights of Detroit school children. Therefore, the District Court had the broad traditional powers of equity to order into effect a plan which includes programs specifically designed to eradicate all vestiges of segregation and to protect its order by including programs designed to insure that the plan will succeed.

The State Defendants analogize the District Court's finding at the remedy stage that educational components are necessary with the previous District Court finding that the Detroit school system could not be desegregated within Detroit. They then point out that this Court reversed a metropolitan plan. However, this Court reversed because it found that the District Court imposed the remedy on suburban school districts which at that point had not been found to have committed any violation:

To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court. *Milliken v. Bradley*, 418 U.S. at 745.

The analogy with *Milliken* fails because implementation of the remedy of the educational components is the responsibility of the two parties who committed the violations.

Swann and *Milliken* emphasize this Court's view that a court may not impose a remedy on a party which has not committed a legal wrong. They do not speak to the issue of the scope of the remedy equity may impose on parties found to have committed the violation of segregation. For this one must look to the traditional powers of equity.

This Court in *Brown v. Board of Education*, 349 U.S. 294 (1955), determined that school desegregation remedies should be fashioned and effectuated by the local courts and directed these courts to apply traditional equitable principles in shaping a remedy to "effectuate a transition to a racially non-discriminatory school system". 349 U.S. at 300-01.

Swann reaffirms that courts must utilize their "historic equitable remedial powers" and that federal legislation does not restrict the power of the court to remedy violations of the Fourteenth Amendment. 402 U.S. at 16. Each of these cases relies on the language used by Mr. Justice Frankfurter writing for the Court in *Hecht v. Bowles*, 321 U.S. 329, (1944), a non-discrimination case, to describe the nature of equitable decrees in a discrimination case:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-30.

Thus, once a violation has been found, courts have broad remedial powers. The breadth of these powers is illustrated by the following cases wherein remedies designed to eliminate all of the effects of discrimination and to restore plaintiffs to the fullest possible extent have received judicial approval.

Louisiana v. United States, 380 U.S. 145 (1965) was a voting rights case. Not only was the interpretation test invalidated, but this Court approved the District Court's order requiring the complete re-registration of all voters in order to root out all vestiges of discrimination. In affirming the remedy devised by the District Court, this Court commented on the scope of the remedial power of equity:

We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

* * *

The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws,

policies, and traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case to hear any evidence of discrimination in other parishes and to enter such orders as justice from time to time might require. 380 U.S. at 154, 156.

The components were included as a form of equitable relief to rectify the harm done by past discrimination and are analogous to the relief granted by the District Court in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), when absent any statutory grant of authority other than to order "any other equitable relief as the court deems appropriate", the court ordered seniority status retroactive to the date of employment for denial of employment due to race. In *Franks*, the violation was discriminatory hiring practices, not a discriminatory seniority system. This Court's affirmance was a recognition that by including such language Congress intended to vest broad equitable discretion in the district courts to grant "make whole" relief. Surely, if courts have such power to rectify a statutory violation, could the remedy be less when a constitutional violation is involved?

In devising desegregation plans, courts have applied equitable principles and have not limited relief of segregation to pupil reassignment. They have rendered decrees designed to eliminate the effects of past segregation and to prevent the continuation of discriminatory practices.

In *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), the District Court's desegregation plan included remedial programs for black students who would be transferring to formerly all white schools. On appeal these programs were approved because they eliminate effects of segregation inherent in a dual school system.

The remedial programs, ordered by the district court, are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion. 415 F.2d at 831 (emphasis added).

The trial court's plan also included such details as the repairing of locks and windows, the time schools should open, reinstitution of the school lunch program and bookmobile service, etc. All of these programs were affirmed on appeal as a just exercise of the court's discretion. While affirmance of these latter programs was induced in large part because defendants had openly opposed desegregation, affirmance of the remedial programs was not based on the hostility of school officials, but rather "inequities and discrimination inherent in the dual school system".

Circuit Judge Wisdom reaffirmed the Fifth Circuit's position that remedial programs were necessary to correct the effects of segregation in *George v. O'Kelly*, 448 F.2d 148 (5th Cir. 1971). *O'Kelly* involved the use of Title I funds and was remanded to the district court with the following instructions:

The court should consider whether achievement grouping or remedial programs during the regular school year result in racial segregation within the school. If so, the court should inquire whether this results from the county's provision of relatively inferior education to the black community in the past . . . Also, if the court finds that black children have a lower educational achievement level because of inferior education to the black community in the past, it should consider whether the board's allocation of Title I funds comports with its duty to overcome any special educational deprivation of black children due to past discrimination. . . . The purpose of Title I of the Elementary and Secondary Education Act of 1965 is congruent with the affirmative duty of the board to take appropriate action to overcome any effects of past racial discrimination. 448 F.2d at 150.

Not only are these four programs within the scope of the remedy because they are necessary to cure the effects of segregation, but also because they promote effective desegregation.

Magnet schools in desegregation plans have the stamp of judicial approval as a desegregative tool. *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976), cert. denied, 96 S. Ct. 2648 (1976); *Hart v. Community School Board of Brooklyn*, 383 F. Supp. 699,

764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). In approving the use of a magnet school in a desegregation plan the *Hart* court stated:

From *Brown II* on, the affirmative duty of school boards to root out the dual system of education has meant more than merely allowing black children into hitherto closed white schools. 512 F.2d at 54.

Special language programs have been approved if they remove obstacles to effective desegregation. *Keyes v. School District No. 1, Denver, Colorado*, 521 F.2d 465, 482 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

In devising an equitable remedy to correct the constitutional violation of segregated schools in Detroit, the District Court had the power and the duty to eliminate all vestiges of segregation by including in Detroit's desegregation plan remedial reading programs and revisions in testing procedures and counseling and guidance programs. In addition, the District Judge had the power to take these steps to ensure that the plan will work and also to include an in-service training program for teachers faced with the demands of desegregating a previously segregated school system.

The programs of reading, in-service training, testing, and counseling and guidance in the Detroit plan are remedies designed to restore, to make whole, to eliminate the effects of the segregation found to exist in Detroit and to remove obstacles to effective desegregation. These remedies are distinguishable from a pupil reassignment remedy rejected by this Court in *Austin Independent School District v. U.S.*, 45 U.S.L.W. 3413 (12-7-76), because the Austin plan exceeded the constitutional obligation to restore the students to the position they would have had but for the school authorities' failure to fulfill their constitutional obligations.

E. THERE IS NO CONFLICT WITH OTHER JURISDICTIONS.

Keyes v. School District No. 1, Denver, Colorado, 521 F.2d 465 (10th Cir. 1975) is easily distinguished because it does not hold

that a segregation remedy must be restricted to pupil reassignment. On the contrary, the *Keyes* court recognized that the district court could require the schools to help Hispanic school children learn English so they could learn other basic subjects and that to do so would remove an obstacle to effective desegregation. 521 F.2d at 482. The Court then remanded "for a determination of the relief, if any, necessary to ensure that Hispanic and other minority children will have the opportunity to acquire proficiency in the English language." 521 F.2d at 483.

What the *Keyes* court did object to was an elaborate plan extending to "matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, noninstructional service and community involvement", and including such matters as education for three-year olds and adults and clothing for poor children. 521 F.2d at 480-81. In rejecting this so-called Cardenas Plan the Court stated:

[B]ut the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. *Instead of merely removing obstacles to effective desegregation*, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far. 521 F.2d at 482 (emphasis added).

The facts of this case distinguish it from *Keyes*. The four programs described in prior sections of this brief are directly related to remedying the effects of past segregation and removing obstacles to effective desegregation. Furthermore, the federal judiciary has not taken over the operation of the Detroit school system, instead the Detroit Board, later assisted by the State Board, proposed and developed these programs solely "to eliminate the vestiges of segregation" and to overcome "obstacles to effective desegregation".

F. CONCLUSION.

A desegregation plan may include more than pupil reassignment. The power of a court to order remedial programs when the

constitutional violation of segregation has been found has gone unquestioned until the State of Michigan, as co-defendant in this action, was ordered to pay for part of these programs. The four programs at issue are directly related to desegregation. They are reasonable, feasible and workable. They do not constitute an abuse of discretion by the District Court.

The State Defendants worked with the Detroit Board in developing some of these programs without appealing their legal propriety. Only after the District Court's Judgment of May 11, 1976 (PA 145a) requiring them to pay one-half of the cost of implementing the four programs here at issue did these defendants raise this question as one more ground for this Court to find that the State will not have to bear a part of the cost of remedying the segregation which it helped create.

The State Defendants have cited no cases which hold that once a court has determined that schools are segregated it cannot require the parties who caused that segregation to participate in remedying that violation. No separate finding of a constitutional violation in educational programs is necessary. A remedy to correct the constitutional violation of segregated schools properly may include these four remedial programs which have been specifically designed to correct conditions brought about by the inequities and discrimination inherent in a segregated school system and to overcome obstacles to effective desegregation.

The Court of Appeals did not err in holding that the District Court did not exceed its remedial powers. The evidence at each stage of this proceeding justifies the District Judge's finding that these four components are necessary to remedy the effects of past segregation, make desegregation succeed and prevent re-segregation in Detroit.

II.

WHERE THE STATE DEFENDANTS HAVE BEEN ADJUDICATED TO HAVE VIOLATED THE FOURTEENTH AMENDMENT RIGHTS OF DETROIT SCHOOL CHILDREN, THE TENTH AMENDMENT MAY NOT BE INVOKED AS A BAR TO REMEDYING THE CONSTITUTIONAL VIOLATION.

This litigation, pending since August 18, 1970, has been before two District Judges, the Court of Appeals for the Sixth Circuit on at least six occasions and has been the subject matter of a decision by this Court. The State Defendants have never raised or argued that the Tenth Amendment bars any remedial relief being levied against the State Defendants, until their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 20-21, filed on September 24, 1976. By waiting more than six years and numerous court proceedings to raise this alleged defense, the State Defendants have precluded consideration of this issue by the courts below. Therefore, this Court, consistent with its general policy of refusing to hear issues raised for the first time before it, should refuse to consider the Tenth Amendment argument of the State Defendants. *Hormel v. Helvering* 312 U.S. 552, 556-57 (1940); *Anderson v. United States*, 417 U.S. 211, 217 (1974); *Adickes v. S. H. Kress & Company*, 398 U.S. 144, 147 (1970); *Lawn v. United States*, 355 U.S. 339, 362 n. 16 (1958); *Husty v. United States*, 282 U.S. 694, 701-02 (1931).

Additionally, this Court should not consider the State Defendants' Tenth Amendment argument that principles of federalism preclude prospective injunctive and incidental monetary relief redressing violations of Fourteenth Amendment rights as said argument has no foundation in any decision ever rendered by this Court.

The express language of the Tenth Amendment refutes this argument:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The State Defendants have ignored the following language from the Fourteenth Amendment:

No State . . . shall deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

Almost one hundred years ago this Court, in *Ex parte Virginia*, 100 U.S. 339 (1880), established that the Fourteenth Amendment limits the reservation of powers contained in the Tenth Amendment. In upholding the indictment of a state judge, under a federal criminal statute prohibiting the exclusion of a juror, in a state court, because of his or her race, this Court stated:

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State's sovereignty. No law can be, which the people of the State have, by the Constitution of the United States, empowered Congress to enact.

. . . It is said that selection of jurors for courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. *But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.* 100 U.S. at 346 (emphasis added).

See *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

The States, in ratifying the Fourteenth Amendment, approved this limitation of state authority. It is, indeed, ironic that

the State Defendants now attempt to repudiate that which was agreed upon by the States over a hundred years ago.

In *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976), reaffirming *Ex parte Virginia*, *supra* this Court commented upon the limitation on state sovereignty that is imposed by the Fourteenth Amendment:

As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their authority.

* * *

The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to the treatment of private individuals. Standing behind the imperative is Congress' power to "enforce" them "by appropriate legislation". 96 S. Ct. at 2670.

Obviously, the Fourteenth Amendment specifically prohibits segregation by race in the schools. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1, 6-7 (1958); *Goss v. Board of Education of City of Knoxville*, 373 U.S. 683, 687 (1963).

The State Defendants, apart and separate from the Detroit Board, have been found guilty of being a substantial cause of the segregation found to exist in the Detroit school system. *Bradley v. Milliken*, 338 F. Supp. 583 (E.D. Mich. 1971); *Bradley v. Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973); *Milliken v. Bradley*, 418 U.S. 717, 725-28, 746 (1974). In *Hills v. Gautreaux*, 425 U.S. 284, 298 n. 13 (1976), this Court interpreted *Milliken* by unanimously stating ". . . [T]he State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 U.S. at 734-735, n. 16 . . ." See *Bradley v. Milliken*, 540 F.2d 229, 234 (6th Cir. 1976).

Given the established Fourteenth Amendment state violation here, the Tenth Amendment, or a claim of federalism, cannot bar the remedial relief which is necessary to eradicate and eliminate the constitutional violation of the State Defendants.

The fact that the Tenth Amendment cannot constitute a bar to remedying a violation of the Fourteenth Amendment was recognized in *Bradley v. School Board of Richmond, Virginia*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by equally divided court*, 412 U.S. 92 (1973) where the Fourth Circuit failed to find a constitutional violation on behalf of the Commonwealth of Virginia. The Fourth Circuit made it clear that if a violation of the constitutional rights of the Richmond school children had been found against the Commonwealth, as is the case in Detroit, the Tenth Amendment would not bar the Court from requiring the Commonwealth of Virginia to remedy a constitutional violation:

If the state's near plenary power over its political subdivisions 'is used as an instrument for circumventing', *Gomillion, supra*, at 347, 81 S. Ct. at 130, the Fourteenth Amendment equal protection right of blacks to attend a unitary school system, then the Tenth Amendment is brought into conflict with the Fourteenth, and it is settled that the latter will prevail. *Gomillion, supra*. 462 F.2d at 1068-69.

See *United States v. State of Missouri*, 515 F.2d 1365, 1372 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975).

The case of *Rizzo v. Goode*, 423 U.S. 362 (1976) does not support the State Defendants. In *Rizzo* this Court reversed a holding that required city officials to implement internal procedures within the Philadelphia Police Department because there was no finding of any constitutional violation by those officials. In making that distinction, this Court stated:

Respondents, in their efforts to bring themselves within the language of *Swann*, ignore a critical factual distinction between their case and the desegregation case as decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrative and school board members who had in their employ a small number of individuals, which later on their

own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their *own* conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. 423 U.S. at 377.

Based upon their failure to acknowledge this distinction in *Rizzo*, the State Defendants argue that under the Michigan Constitution of 1963 and various state laws, the State Defendants are, as a matter of law, prohibited from appropriating state funds to pay for the remedy that is necessary to vindicate the constitutional rights of the Detroit school children. To accept this argument would effectively allow states, who had unquestionably violated the Fourteenth Amendment, to hide behind state law in order to deprive innocent children of their remedies. State law cannot be invoked to frustrate the spirit and purposes of the Fourteenth Amendment. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971); *Louisiana v. United States*, 380 U.S. 145, 154-56 (1965).

A similar attempt to circumvent and nullify the provisions of the Fourteenth Amendment was rejected by this Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) when it overturned the Alabama Legislature's attempt to disenfranchise black voters:

If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fourteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by the respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of re-alignment of political subdivisions. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." 364 U.S. at 345 (citation omitted).

Gomillion clearly refutes the State Defendants' attempt to shield themselves behind principles of federalism while violating the Fourteenth Amendment rights of the Detroit school children. If the State Defendants are allowed to insulate themselves from a remedy, by hiding behind provisions of the Michigan Constitution of 1963, any state would be able to nullify the commands of the Fourteenth Amendment that no citizen be denied equal protection of the laws. Such attempts have always been rejected in school desegregation cases. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958).

The State Defendants' reliance on *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), holding that the Fair Labor Standards Act could not be broadly applied to state employees consistently with the Tenth Amendment, is misplaced.

Here, the District Court's Order was not an infringement upon "functions essential to separate and independent existence" of state governments, as in *National League of Cities*, but was carefully measured to effectuate compelling national policy.⁸

Indeed, it is the character of the national policy involved which provides the cogent reason for the inapplicability of the Tenth Amendment. Whereas, in *National League of Cities*, this Court was dealing with statutory rights, this case involves constitutional rights. No reading of the language of the Tenth Amendment can support an interpretation which reserves to the states the power to withhold compliance with the constitutional guarantee of equal protection of the laws.

This Court, in *National League of Cities*, expressly declined determination of whether "different results might obtain if Congress seeks to affect integral operations of state governments by exercising power granted it under such sections of the Constitution as . . . the Fourteenth Amendment." 96 S. Ct. at 2474. In *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976), this Court expressly

⁸ In *National League of Cities*, the Court expressly reaffirmed its holding in *Fry v. United States*, 421 U.S. 542 (1975), wherein the wage and price controls, imposed by the Economic Stabilization Act, were held to be a minor intrusion of the state's sovereignty and not prohibited by the Tenth Amendment.

recognized that Title VII of the Civil Rights Act of 1964 could be constitutionally applied to the states. See *United States v. State of New Hampshire*, 539 F.2d 277 (1st Cir. 1976).

On October 28, 1976, the Court of Appeals for the Third Circuit in *Usery v. Allegheny County Institution Districts*, 544 F.2d 148 (3d Cir. 1976), sustained the Equal Pay Act, distinguished *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), and held that Congress possessed the power, under Section 5 of the Fourteenth Amendment, to prohibit discrimination on the basis of sex. The Third Circuit said:

We note at the outset that in *National League of Cities* the plurality opinion expressly disclaimed any intention of ruling upon the constitutionality of the exercise of Congressional authority against the States pursuant to Section 5 of the fourteenth amendment. Four days later the Court unanimously sustained the exercise of such power in *Fitzpatrick v. Bitzer*, U.S. , 96 S. Ct. 2666, 49 L. Ed. 2d (1976). In *Fitzpatrick* it upheld the constitutionality of the 1972 extension of Title VII of the Civil Rights Act to state and local governmental employees. The latter statute prohibits sex-based employment discrimination, and *Fitzpatrick* involved such a claim. Expressly referring to *National League of Cities*, at , 96 S. Ct. at 2467, the Court made it perfectly clear (1) that Congress has Section 5 Fourteenth Amendment power to prohibit sex discrimination in employment, and (2) that such power, despite the Tenth Amendment, extends to the state as an employer. 544 F.2d at 155.

Accord, *Usery v. Dallas Independent School District*, 421 F.Supp. 111 (N.D. Tex. 1976); *Usery v. Board of Education of Salt Lake City*, 421 F.Supp. 718 (D. Utah, 1976); *Harris v. Commonwealth of Pennsylvania*, 419 F.Supp. 10 (M.D. Pa. 1976).

Thus, the lower courts have recognized that *National League of Cities* did not hold that the Tenth Amendment restricted Congress' right to enforce the Fourteenth Amendment against the states. This litigation, involving Detroit school children, has been brought pursuant to 42 U.S.C. §§1981, 1983 and

2000d. These statutory provisions have been enacted by Congress pursuant to the Fourteenth Amendment. The Tenth Amendment does not and cannot prohibit or impede the vindication of the constitutional rights of Detroit school children.

The fact that constitutional rights, as guaranteed by the Fourteenth Amendment, supersede principles of federalism and the Tenth Amendment, was reaffirmed by this Court in its recent decision in *Elrod v. Burns*, 96 S. Ct. 2673 (1976) where the Mayor of Chicago had subjected public employees to discharge if they refused to join the Democratic Party. Responding to the municipal defendants' contention that the federal courts could not interfere, due to principles of state sovereignty, in the operation of the executive level of state or city governments, this Court said:

More fundamentally, however, the answer to petitioners' objection is that there can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power. And our determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document. 96 S.Ct. at 2679.

The absurdity of the State Defendants' federalism-Tenth Amendment argument is obvious. The State Defendants, like the defendants in *Elrod*, *supra*, do not have the power to violate the Fourteenth Amendment rights of the school children of the City of Detroit and the Constitution does not provide the State Defendants with the power to escape the remedy. The State Defendants have caused the wrong suffered by these children and the State Defendants must therefore share in the costs of the remedy.

III.

NEITHER THE ELEVENTH AMENDMENT NOR DECISIONS OF THIS COURT PREVENT FEDERAL EQUITY JURISDICTION FROM ORDERING STATE DEFENDANTS WHO HAVE BEEN FOUND GUILTY OF DE JURE SEGREGATION TO FINANCE PART OF THE IMPLEMENTATION OF A PLAN OF DESEGREGATION.

The decisions of this Court concerning the enforcement of school desegregation requirements from *Brown* through *Milliken* and up to the present day have one common predicate: given a constitutional duty of equal protection and a finding of a violation thereof by state action through state officials,⁹ there is a consequent remedial obligation under the Fourteenth Amendment. The fact that state officials with state-wide authority are involved with the violation certainly does not alter the requirement for a remedy or excuse those officials from the remedy.

The argument of the State Defendants and the *Amici* relative to an alleged Eleventh Amendment bar to financial assistance in the implementation of the Detroit school desegregation plan was apparently written by those who have not read the record in this case. The argument ignores the fact that the State Defendants have been found guilty of *de jure* acts of segregation within Detroit; misapprehends the equitable nature of the remedial phase of a Detroit-only desegregation plan; and mischaracterizes the ancillary financial consequences of the injunctive relief ordered below against two constitutional wrongdoers.

Throughout the Brief of the State Defendants there is one constant theme with several variations: the lower courts do not have the authority to include the State Defendants in a remedy, nor to prevent a constitutional tragedy in Detroit. This is not true. The legal genesis of school desegregation remedies, sound

⁹ A metropolitan remedy was not approved in *Milliken v. Bradley*, 418 U.S. 717, 752 (1974) because there was no finding of any violation involving the suburban school districts. However, here there has been a specific finding of a constitutional violation committed by the State Defendants.

logic and settled law dictate that this is not a proper case for an Eleventh Amendment jurisdictional prohibition.¹⁰

A. THE INJUNCTIVE RELIEF ORDERED BELOW IN A DESEGREGATION CASE IS NOT PROHIBITED BY THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT.

U.S. 651 (1974), for the proposition that the Eleventh Amendment prevents their ancillary financial participation in remedying violations of the Constitution is misplaced.

The essence of the argument presented by the State Defendants is not novel. It is often made by state officers in an attempt to frustrate remedial orders of federal courts in the area of school desegregation. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Swann v. Charlotte-Mecklenburg Board of Education*, 318 F. Supp. 786 (W.D. N.C. 1970). This argument consistently has been laid to rest as quickly as it has been raised. *Cooper, supra*; *Griffin, supra*; *Swann, supra*.

Although this Court has, on occasion, recognized the immunity of states from suits involving *direct* actions against governmental funds or property, when brought for the comp-

¹⁰ The State Defendants have been parties to this lawsuit since its institution in 1970. Petitioner State Defendants specifically urged an Eleventh Amendment bar to their inclusion in the previously proposed metropolitan remedy in their Brief at 41-46 submitted in the October Term, 1973. This Court subsequently rendered its decision in *Milliken, supra*, 418 U.S. 717 (1974), remanding the case to the District Court for a Detroit-only remedy. This Court made no comment concerning the arguments urging an Eleventh Amendment jurisdictional bar to including the State Defendants in that Detroit-only remedy, which is now the subject of this appeal.

laintants' personal benefit,¹¹ this Court has not deemed the Eleventh Amendment a serious impediment to judicial action when the protection of compelling constitutional guaranties has been an issue. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842 (1824); *Graham v. Folsom*, 200 U.S. 248 (1906); *Ex parte Young*, 209 U.S. 123 (1908).

The relief ordered herein for the vindication of constitutional rights was the educational components designed to eliminate the vestiges of segregation, not, as the State Defendants and *Amici* have contended, the direct payment of unappropriated funds from the state treasury. It is conceded that the implementation of each component in the desegregation plan will cost the Detroit Board and State Defendants money which might otherwise not have been spent. *See Evans v. Ennis*, 281 F.2d 385, 392 (3d Cir. 1960). However, this Court noted in *Edelman v. Jordan*, 415 U.S. 651 (1974) that:

Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*. 415 U.S. at 668.

The evolution of the above-quoted *Edelman* rule can be traced through a number of prior decisions of this Court. *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1873), was the first of the

¹¹ *See, e.g., Louisiana v. Jumel*, 107 U.S. 711 (1883) (mandamus suit against the state in its political capacity by bondholders to compel specific performance by state officers, who had no contract relations with the bondholders, to act in derogation of the new state constitution; change the general administration of state finances and thus make direct payment of a judgment from the treasury); *Great Northern Life Insurance Co. v. Read, Insurance Commissioner*, 322 U.S. 47 (1944) (suit against state officials to recover taxes); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (suit against state officials for tax refund). These cases are relied upon heavily by State Defendants, along with *Hans v. Louisiana*, 134 U.S. 1 (1890) which involved a suit for *direct* payment from the state treasury of a judgment. *Jumel, supra* involved the state in its political, not its governmental capacity. Plaintiffs sought a money judgment by asking for a change in the general administration of state finances. This Court found this was "not . . . the ordinary form of judicial procedure . . ." 107 U.S. at 722. *Hans, supra*, did not contemplate the violation of the Fourteenth Amendment. Furthermore in deciding *Hans*, this Court clearly did not preclude suits by citizens of the state against state officers where claims arise under the Constitution. *Cf. Fitzpatrick v. Bitzer*, 96 S.Ct. 2666 (1976).

post Civil War cases in which a suit against a state officer was challenged as one against the state itself in violation of the Eleventh Amendment. The Court rejected this argument, asserted jurisdiction and enjoined the Governor of Texas from transferring land which the state had placed in a school fund by virtue of a new state constitution.

In *Smyth v. Ames*, 169 U.S. 466 (1898), this Court unanimously enjoined the Nebraska State Board of Transportation from hearing any complaint against the various railroad companies for violations of a state railroad rate law. In disposing of the Eleventh Amendment argument, this Court stated:

It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State . . . 169 U.S. at 518-19.

See *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894).

In *Ex parte Young*, 209 U.S. 123 (1908), this Court ruled that the challenged legislation from the State of Minnesota violated the Fourteenth Amendment. In sustaining an injunction against the State Attorney General from enforcing the unconstitutional act, this Court rejected an Eleventh Amendment defense on the grounds that:

[I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. 209 U.S. at 155-56.

The doctrinal development embodied in *Young* liberalized the principles governing suits against state officers in that the substantive rights guaranteed by the Fourteenth Amendment were accorded broad federal judicial protection. See C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 143 (1972). The limitations of the Fourteenth Amendment guarantees are

upon state action. Judicial implementation of these guarantees in suits against state officers would present a doctrinal dilemma if the Eleventh Amendment presented an across-the-board jurisdictional bar to suits against State Defendants. See *Prout v. Starr*, 188 U.S. 537, 543 (1903); *Ex parte Virginia*, 100 U.S. 339, 345-48 (1880).

The doctrinal genesis of *Ex parte Young* was followed in *Home Telephone and Telegraph Company v. City of Los Angeles*, 277 U.S. 278 (1913), where the Court in discussing the extent of the Fourteenth Amendment, stated:

. . . That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. 227 U.S. at 288.

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), which involved the closing of public schools and the operation of an alternative system of all white private schools, Justice Black speaking for a unanimous Court, summarily dismissed the Eleventh Amendment argument by stating:

It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that the state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled long since Ex Parte Young, [citation omitted], that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment. 377 U.S. at 228 (emphasis added).¹²

¹² There can be no doubt that in *Griffin* the State was clearly implicated. All parties to the litigation treated the suit as one against the state. See Briefs of Counsel, 12 L.Ed.2d at 1105-09. In *Griffin* the reopening of the schools presumably would have involved some state funds since other public schools received state support. 377 U.S. at 223. Indeed, the Attorney General of Virginia presented a 12-page argument that the suit, brought to enjoin the school board, other agencies and certain officers from refusing to maintain and operate an efficient system of free public schools, was a proceeding against the state barred by the Eleventh Amendment. C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 156 (1972).

The foregoing Eleventh Amendment line of cases culminated in *Edelman v. Jordan*, 415 U.S. 651 (1974)¹³ where this Court distinguished between a legally cognizable prospective injunctive relief directed toward the state to conform its actions to a constitutional mandate as opposed to a retroactive money judgment against the state treasury:

It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule . . . 415 U.S. at 668.

In recognizing the difference between a prohibited retroactive direct money judgment and a permissible prospective injunctive remedy, this Court acknowledged that orders such as those entered in *Ex parte Young*, *supra*, and subsequent cases had, in fact, substantial impacts on state revenues.

The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. [Citations and discussion omitted]. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. . . . Such an ancillary effect on the state treasury is a permissible and

¹³ While *Edelman* involved an Illinois statutory provision which was found to be inconsistent with a federal regulation, the present lawsuit involves a state statute [Act 48, §12 Mich. Pub. Acts of 1970] which was found to be an unconstitutional interference with Fourteenth Amendment rights, 433 F.2d 897 (6th Cir. 1971), and other actions by state officials and agencies found to have violated those same rights. *Milliken v. Bradley*, 418 U.S. 717, 725-28, 746 (1974).

often inevitable consequence of the principle announced in *Ex parte Young*, *supra*. 415 U.S. at 667-68.¹⁴

Thus, the majority opinion in *Edelman* recognized that the Eleventh Amendment would not apply "where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments . . .". 415 U.S. at 666 n. 11. Additionally, some ancillary effect on the state treasury was acknowledged as "a permissible and often inevitable consequence" of injunctive relief. 415 U.S. at 668.

The order below conforms with the requirements of *Ex parte Young* and *Edelman*. Rather than being a retroactive payment of compensation, the requirement that the State Defendants finance a portion of the desegregation remedy is merely a "necessary consequence of compliance in the future with a substantive federal-question determination" which is required by a "court-imposed obligation". 415 U.S. at 668. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666, 2673 (1976) (concurring opinion of Justice Stevens).

The decision of the lower courts herein follows the remedial command of the Fourteenth Amendment. It does not present a case which imposes a money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward both the Detroit Board and State Defendants to implement educational components as a part of a prospective plan of injunctive relief to eliminate the vestiges of segregation,

¹⁴ In addition to citing *Graham v. Richardson*, 403 U.S. 365 (1971) (furnishing welfare benefits to aliens) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (no termination of welfare benefits without prior hearing), for examples of cases where the result of compliance with a court decree meant an impact on the state treasury, this Court could also have cited other examples of the reaffirmation of other constitutional rights which may involve demands upon the state treasury. see, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (furnishing counsel for all indigents charged with misdemeanors); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (furnishing counsel for all indigents charged with felonies); *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative reapportionment); *King v. Smith*, 392 U.S. 309 (1968) (AFDC benefits must be paid to a family with a "substitute" single father); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952) (enjoined the State Revenue Commissioner from assessing or collecting ad valorem taxes).

now and hereafter. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Because the State Defendants have been found guilty of unconstitutional acts and actions, their Eleventh Amendment defense is necessarily limited by the remedial requirements of the Fourteenth Amendment. *Cf. Fitzpatrick v. Bitzer, supra*.

In reviewing the facts and the relevant law, it becomes readily apparent that the present State Defendants through the exercise of the inherent powers which they possess as officers and instrumentalities of the State and through the persuasive powers which their offices command, can and should effectuate and implement the educational components ordered by the lower court.¹⁵ To rule to the contrary on the basis of an Eleventh Amendment prohibition would result in an erroneous constitutional premise unfounded in law, presenting faulty precedent and ultimately serving to further penalize the school children in the Detroit system rather than in assisting in affording them a realistic and workable remedy for an unconstitutional condition.

It is inconceivable that an interpretation could be placed upon the Eleventh Amendment *vis-a-vis* the Fourteenth Amendment which would prohibit or meaningfully inhibit the implementation of a school desegregation remedy in full vindication of Fourteenth Amendment rights for the sole reason that part of the costs of the remedy would have to be paid from state funds. Such a result would give lie to the Fourteenth Amend-

¹⁵ Several Courts of Appeals have found an affirmative duty for state officials to assist in remedying unconstitutional conditions and have rejected the Eleventh Amendment arguments of State officials attempting to avoid the constitutional responsibilities. *Wyatt v. Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974) (holding that a state legislature is not free, for budgetary or any other reasons, to provide a social service in a manner which results in the denial of individuals' constitutional rights); *United States v. Board of School Commissioners of Indianapolis*, 503 F.2d 68, 82 (7th Cir. 1974) (holding that the Eleventh Amendment does not prevent the enforcement of the Fourteenth Amendment); *Lewis v. Shulimson*, 534 F.2d 794, 795 (8th Cir. 1976) (holding that the notification expenses and the future medical assistance payments were the necessary result of compliance with the decree which by its terms was prospective in nature).

ment proposition that "within its limits it is complete", *Ex parte Virginia, supra*; *Bitzer, supra*, and would forever foreclose effective relief under the Fourteenth Amendment for official, state-imposed constitutional violations.¹⁶

B. THE ELEVENTH AMENDMENT MAY NOT BE ASSERTED TO PREVENT EFFECTIVE RELIEF FOR A VIOLATION OF THE FOURTEENTH AMENDMENT.

The Eleventh Amendment contains limitations with respect to the exercise of federal judicial power in certain actions brought against the States, while the Fourteenth Amendment grants the individual private rights which limit the power of the States. When conflicts arise the Fourteenth Amendment, without question, must prevail over the Eleventh Amendment.

The Supreme Court has never specifically decided this issue. In *Ex parte Young*, 209 U.S. 123 (1908), the Court found it unnecessary to decide this issue and stated:

We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth Amendment], but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment. 209 U.S. at 150.

Nor was the issue addressed in either *Edelman v. Jordan*, 415 U.S. 651 (1974) or *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976). Those cases dealt respectively with the denial of benefits

¹⁶ Interestingly, neither the State Defendants nor *Amici* argue that the relief contemplated by the lower court order can never be granted. Rather, they contend that the only constitutional violation which would form a predicate for this relief is a state educational financing violation. (Brief of State Defendants at 24-25; Brief of *Amicus* National Association of Attorney Generals at 10; Brief of *Amicus* State of Texas at 4-6). However, the State Defendants have been found to be a substantial cause of the racial segregation in Detroit schools. Additionally, the State Defendants were involved with activities under an unconstitutional statute. *See n. 13, supra*. The thrust of this argument elevates form over substance and would create a new standard for equity review. Under the State Defendants' theory of a remedy, a court could not employ such traditional school desegregation tools as rezoning, school pairings and clusterings, grade reorganizations, magnet schools, city-wide schools, busing, etc. absent a proven constitutional violation in that area. Equity power has never been so limited.

in violation of the Social Security Act and sex discrimination in violation of Title VII and did not involve violations of the Fourteenth Amendment. See *Edelman v. Jordan*, 415 U.S. at 694 n. 2 (Marshall J., dissenting); *Fitzpatrick v. Bitzer*, 96 S. Ct. at 2668 n. 3.

This case involves more than violation of federal statutory law. The conduct of the State Defendants violated not only 42 U.S.C. §§1981 and 1983, but also constituted a direct violation of the equal protection provisions of the Fourteenth Amendment. The State Defendants have engaged in conduct spanning decades which deprived generations of Detroit black students equal educational opportunities. There can be no doubt that the Eleventh Amendment cannot be used to frustrate the remedial commands of the Fourteenth Amendment in desegregation cases.

1. The Eleventh Amendment Was Not Intended to Bar Suits Against States Arising Under the Constitution of the United States.

Federal Court jurisdiction is provided by Article III, Section 2 of the Constitution. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), Chief Justice Marshall provided the conceptual framework for determining the extent of judicial power extended by Article III, Section 2. He explained that federal jurisdiction consists of two classes: (1) "character of the cause", those actions brought under the Constitution and the laws of the United States, and (2) "character of the parties", those actions of a diversity type nature.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court upheld the rights of two South Carolina citizens to collect a debt owed by the State of Georgia on the authority that Article III, Section 2 granted jurisdiction to the federal courts in actions between a state and a citizen of another state. The Eleventh Amendment was ratified in 1798 in response to *Chisholm*. It was only intended to foreclose federal courts from hearing suits, like *Chisholm*, which were brought pursuant to federal jurisdiction based on the character of the parties.

Logic dictates no other conclusion. Federal question jurisdiction did not vest original jurisdiction in federal courts by the Judiciary Act of 1789. Warren, *New Light in the History of the Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). Such jurisdiction did not arise until the Judiciary Act of 1885. 18 Stat. 470, ch. 137, §1. Consequently, the remedial intent of the Eleventh Amendment could not have contemplated the prohibition of federal question jurisdiction. As such, federal question claims under the Fourteenth Amendment are not barred by the Eleventh Amendment.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court, while interpreting the Eleventh Amendment, assumed that federal question suits fell within the purview of sovereign immunity. The Court in *Hans*, 134 U.S. at 10 approached the matter in a conclusionary fashion by citing *In re Ayres*, 123 U.S. 443 (1887), *Hagood v. Southern*, 117 U.S. 52 (1886), and *Louisiana v.*

Jumel, 107 U.S. 711 (1882). These three decisions involved actions under the contract clause, but the issue of the application of sovereign immunity was never raised. Certainly the decision in *Hans* is of limited precedential value since this Court did not treat the question on the merits. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

2. The History Of The Fourteenth Amendment Indicated Reliance Was Not To Be Placed Upon State Enforcement Of Constitutional Rights, And That Federal Courts Were To Have Inherent Jurisdiction To Protect Such Rights.

The opponents of the Reconstruction Amendments (Thirteenth, Fourteenth and Fifteenth Amendments) and legislation objected to such measures on the ground that reliance could be placed on the "honest purpose of the Several States" to protect the rights of citizens. Cong. Globe, 39th Cong., 1st Sess. 1064, 1294 (1866). In response to that argument Representative Wilson, speaking in favor of an 1866 Civil Rights Bill stated:

If the States would all observe the rights of our citizens, there would be no need for this bill . . . If they would recognize that general citizenship . . . which under this [privileges and immunities] clause entitles every citizen to security and protection of personal rights, . . . we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny. Cong. Globe, 39th Cong., 1st Sess. 1117-18 (1866).

Further amplification was made by Representative Cook:

Suppose . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen . . . It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them . . . Does any man in this House believe that these people can be safely left in these States without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men. Cong. Globe, 39th Cong., 1st Sess. 1124-25 (1866).

Six years of experience after the Civil War served only to confirm Congress' fears in this regard. The Civil Rights Act of 1871 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 171, 197 (1961). More than a century after the ratification of the Reconstruction Amendments, history has shown that the States not only cannot be looked to for protection of such rights, but that the States, including Michigan, have actively engaged in the denial of constitutional rights. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

At several points in the congressional debates the proponents of the Reconstruction Amendments complained of the inability of federal courts to protect the natural rights of individuals from infringement by the States because of their lack of power to order compliance by the States with the "Bill of Rights". J. ten Broek, *Equal Under Law*, 95 n. 198, 128 (1965). Representative Bingham, who drafted a substantial portion of Section 1 of the Fourteenth Amendment, stated that it was

intended to reverse the position taken in *Baron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights did not apply to the States. He expressed his thinking on the extent of the Fourteenth Amendment in debates on the Civil Rights Act pending before Congress in 1871:

In re-examining that case of Barron, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'No state shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts', imitating their example and imitating it to the letter, I prepared the provision of the first section of the Fourteenth Amendment as it stands in the Constitution, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Cong. Globe, 42d Cong., 1st Sess. 83 App. (1871).

The only possible conclusion is that the drafters of the Reconstruction Amendments intended that federal courts have federal question jurisdiction for the maintenance of suits against the States, which violated the rights guaranteed by those Amendments.

3. The Fourteenth Amendment Granted Citizens Substantive Rights Which Can Be Enforced Against the States.

The Reconstruction Amendments were remedial in nature. They were intended to recognize rights that many abolitionists claimed existed by virtue of the privileges and immunities clause and the Bill of Rights. *See generally* J. ten Broek, *Equal Under Law* (1965). Representative Bingham explained that the Fourteenth Amendment did not create new substantive rights at the expense of the state:

[T]his amendment takes from no state any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. Cong. Globe, 39th Cong., 1st Sess. 1117 (1866).

The Fourteenth Amendment was intended to limit the exercise of state power, which had been used to deprive citizens of their constitutional rights.

While introducing the proposed Fourteenth Amendment to the Senate, Senator Howard discussed the objectives of Section 1:

Now sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. *The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) (emphasis added).

The Fourteenth Amendment was not only intended to restrain the exercise of state power, but also contemplated substantive rights to compel states to respect fundamental guarantees.

The proponents of the Civil Rights Acts recognized that the Acts were not intended to create new rights. Substantive rights already existed by the provisions of the Constitution. Representative Wilson's discussion of the 1866 Civil Rights Bill is enlightening:

Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. *We are following the Constitution. We are reducing to statute from the spirit of the Constitution. We are establishing no new right, declaring no new principle.* It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (emphasis added).

The Civil Rights Acts were aimed at providing remedies. Representative Bingham gave examples of the citizens' lack of remedy during debate of the 1871 Civil Rights Act:

The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, *the citizen had no remedy.* They denied trial by jury, and *he had no remedy.* They took property without compensation, and *he had no remedy.* They restricted the freedom of the press, and *he had no remedy.* They restricted the freedom of speech, and *he had no remedy.* They restricted the rights of conscience, and *he had no remedy.* They bought and sold men *who had no remedy.* Cong. Globe, 42d Cong., 1st Sess. 85 App. (1871). (emphasis added).

Both the history of the Fourteenth Amendment and the subsequent Civil Rights Acts disclose that the Fourteenth Amendment granted citizens substantive rights that were enforceable against the States.

Most recently in *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976) this Court recognized the substantive nature of the rights contained in the Fourteenth Amendment and the direct limitations superimposed on the States thereby when it stated:

In that section Congress is expressly granted authority to enforce "by appropriate Legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. 96 S. Ct. at 2671.

If any doubt remains as to the substantive nature of the Fourteenth Amendment, the Court should look to the contemporaneous Fifteenth Amendment. It, like the Fourteenth Amendment, is a Reconstruction Amendment. The Fifteenth Amendment has always been treated as creating substantive rights that are self-executing, without further legislative specification. See *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) and cases cited therein. If the Fifteenth Amendment creates substantive rights, the Fourteenth Amendment must do likewise. These Fourteenth Amendment rights are enforceable against the States in federal court.

4. Interpretation Of The Scope Of The Fourteenth Amendment Has Recognized That It Was Intended To Modify And Limit The Operation Of The Eleventh Amendment.

Although the State of Michigan would have the Court believe that the Eleventh Amendment is coextensive with the Fourteenth Amendment, not even the leading case of *Ex parte Young*, 209 U.S. 123 (1908) can suggest such a result. Obviously, at the time of *Young*, this Court did not regard the Eleventh Amendment as an equal of the Fourteenth Amendment. If this Court had, it would not have circumvented the Eleventh Amendment by creating the fiction that the action was not against the state, but against state officials acting outside their scope of authority. As stated in *Louisiana State Board of Education v. Barker*, 339 F.2d 911, 914 (5th Cir. 1964), the time has come to hold that the Eleventh Amendment does not con-

template a suit based on state action, contrary to the Fourteenth Amendment, rather than to continue to recognize the anomaly of *Ex parte Young*, *supra*.

Although some deference is given to the equal validity of all the constitutional amendments, the fact of the matter is that the Eleventh Amendment has always been subordinate to the Fourteenth Amendment. The opinion in *Prout v. Starr*, 188 U.S. 537 (1903), is very instructive:

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. *Much less can the 11th Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments.* 188 U.S. at 543 (emphasis added).

The policy considerations for giving the Fourteenth Amendment full effect were discussed in *General Oil Co. v. Crain*, 209 U.S. 211 (1908):

Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against

state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation. . . . The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. See *Ex parte Young*, where this subject is fully discussed and the cases reviewed. 209 U.S. at 226-27.

In *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), an action was brought in federal court challenging telephone rates set by the defendant as unreasonably low in violation of the Fourteenth Amendment. The defendant claimed no federal jurisdiction because the alleged acts were in violation of a similar state constitutional prohibition. Consequently, it was claimed that the alleged acts could not be acts of the state for purposes of jurisdiction under the Fourteenth Amendment.

The Court rejected the theory and hypothesized that if the state supreme court should determine the acts of the defendant were authorized by the state, then a federal court would be barred by the Eleventh Amendment from hearing such a suit. *Home Telephone and Telegraph Co.*, 227 U.S. at 285. Such a theory rests on the premise that *Ex parte Young*, *supra* could not apply, because the acts were those of the state itself and not a state official acting outside the scope of authority.

This Court found such a construction of the Fourteenth Amendment incorrect for it failed to reach the acts of the state. The Court noted:

The provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, *are addressed, of course, to the States*, but also to every person whether natural or judicial who is the repository of state power. By this construction, the reach of the Amendment *is shown to be coextensive with any exercise by a State of power, in whatever form exerted.* 227 U.S. at 286 (emphasis added).

This is an explicit recognition by the Court that the Fourteenth Amendment was addressed to the acts of the state and applied to all power exercised by the state no matter who may exercise that power.

Further discussion reveals that the Court conceived the Fourteenth Amendment to operate on activity of the state within its governmental capacity:

The Amendment, looking to the enforcement of the rights which it guarantees, and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that *States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions*, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. 227 U.S. at 287 (emphasis added).

In *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976) this Court recognized that the Fourteenth Amendment quite clearly contemplated limitations on state authority. Justice Rehnquist, speaking for the court, quoted approvingly from *Ex parte Virginia*, 100 U.S. 339 (1908):

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.

* * *

But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the

general government involves a corresponding diminution of the governmental powers of the States. 96 S. Ct. at 2670-71.

Justice Rehnquist concluded that since *Ex parte Virginia*, there has been a discernible recognition in decisions of the Supreme Court of a shift in the federal-state balance in favor of the former. *Fitzpatrick v. Bitzer*, 96 S. Ct. at 2671.

The import is clear. The Fourteenth Amendment by its very construction was intended to regulate state power as it relates to the rights of the citizen.

The manifest desire of Congress, in framing the Reconstruction Amendments and the Civil Rights Acts, was to exercise all its power to create an effective remedy and to withdraw from the States the power to defeat or prevent enforcement of certain basic rights. The Reconstruction Amendments, including the Fourteenth Amendment, contain substantive rights, *Fitzpatrick v. Bitzer*, 96 S. Ct. at 2670, for which redress may be sought against the States. The States ratified these Amendments and must be bound by their substantive limitations.

Under these circumstances, the Fourteenth Amendment is completely inconsistent and incompatible with the assertion by the State that the Eleventh Amendment limits the power of federal courts to remedy substantive violations of the Fourteenth Amendment.

For these reasons, this Court has no alternative but to find that if there is any conflict between the Fourteenth and Eleventh Amendments, the Fourteenth Amendment must prevail. To hold otherwise would render the Fourteenth Amendment meaningless.

C. THE STATE OF MICHIGAN HAS BY SPECIFIC STATE STATUTE EXPRESSLY WAIVED ITS ALLEGED ELEVENTH AMENDMENT IMMUNITY TO SUITS IN FEDERAL COURT.

Assuming *arguendo* the applicability of the Eleventh Amendment to a desegregation case, the State of Michigan has expressly consented to be sued by waiving its alleged Eleventh Amendment immunity by statutorily authorizing the State Board

of Education to sue and be sued. Mich. Comp. Laws Ann. §388.1007. That enactment sets forth the general powers and duties of the State Board of Education, and in relevant part provides:

The state board of education is a body corporate and . . . may sue and be sued, plead and be impleaded in *all* the courts *in this state* . . . (emphasis added).

The Eleventh Amendment may be waived by a state. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). This Court has held that such a waiver must be by express language or by implication from the text of a waiver provision, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). There is absolutely no question that the State of Michigan, by express language, has waived any alleged immunity.

A state may limit its consent to suits in state courts, without consenting to federal court suits. *Smith v. Reeves*, 178 U.S. 436, 445 (1900). However, such limited consent has been found to exist only where the cause of action arises by state law and relates to state tax laws. *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 465-66 (1945); *Great Northern Life Insurance Co. v. Read, Insurance Commissioner*, 322 U.S. 47, 53-55 (1944); *Chandler v. Dix*, 194 U.S. 590, 591-92 (1904). The theory behind limited consent is that the States may reserve primary control over the operation of their tax laws. *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577 (1946). The claim here does not arise under a state cause of action nor does it focus on a state tax law. Rather, this case involves federal constitutional principles relating to the segregation of Detroit schools by the State Defendants who have been found to be the wrongdoers.

The waiver provision of Mich. Comp. Laws Ann. §388.1007 is a broad and general grant of the powers and obligations to the State Board of Education. Its express language of waiver "in all courts in this state" is all inclusive. It authorizes suits in "all" courts, nor merely *state* courts; and in courts "in" this state, not courts *of* this state. A Federal district court located in Michigan is encompassed within the meaning of "all courts", and it is "in this state".

The Court of Appeals for the Third and Sixth Circuits have reached the same conclusion. *Gerr v. Emrick*, 283 F.2d 293 (3d Cir. 1960); *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). In *Gerr v. Emrick*, *supra*, the Third Circuit found that a provision of the Pennsylvania Turnpike Act which permitted actions brought only in the "proper courts at the County of Dauphin", authorized suit in a U.S. District Court situated in that county.

This Court reached the same conclusion in *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894), when it construed a similar Texas statute as authorizing suits in federal courts:

Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is "a court of competent jurisdiction in Travis County." 154 U.S. at 392.

Most recently, in *Oliver v. Kalamazoo Board of Education*, Docket No. K88-71 C.A. (W.D. Mich. Nov. 5, 1976), a U.S. District Judge sitting in Michigan held that the State of Michigan expressly waived its alleged Eleventh Amendment immunity, thereby consenting to suits in federal courts by statutorily authorizing the State Board of Education to sue and be sued. Mich. Comp. Laws Ann. §388.1007. The District Court was unable to find any legislative history of the statute evincing an intent to restrict the waiver of immunity to state courts.

This Court exercises great hesitancy to overrule decisions by federal courts skilled in the interpretation of state law unless their conclusions are shown to be unreasonable. *Propper v. Clark*, 337 U.S. 472, 486-87 (1949); *Bishop v. Wood*, 96 S. Ct. 2074, 2078 n. 10 (1976). The views of federal judges, who are

familiar with the intricacies and trends of local law and practice, are given great deference. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946).

The statute involved could not be clearer. It waives any immunity to suit in "all courts in" Michigan. A federal district court within Michigan is such a court. That is the view of this Court in *Reagan, supra*, the Third and Sixth Circuits and a District Court in Michigan. For these reasons, the State of Michigan's Eleventh Amendment immunity argument is totally without merit.

IV.

THE DISTRICT COURT'S ORDER REQUIRING THE STATE DEFENDANTS TO ASSIST IN REMEDYING THE CONSTITUTIONAL VIOLATION THEY HAVE CAUSED CANNOT BE HINDERED BY STATE LAWS.

The District Court ordered the Detroit Board and the State Defendants to institute remedial educational components (PA 146a-47a) as a *part* of a remedy. The District Court did *not* order any of the State Defendants to pay out unappropriated funds from the state treasury.¹⁷ Allocation of the cost of the remedial educational components between the parties was merely incidental to the implementation of a prospective injunctive remedy. The order did not require nor result in the restructuring of state school financing.

The State Defendants' reliance on *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), to shield them from inclusion in the remedy is inapposite. The State Defendants are *not* being ordered to remedy school segregation because of a finding that Michigan's system of financing education violates the Constitution; nor does the remedy ordered require any disruption of Michigan's state-wide system of financing public education.¹⁸ *Rodriguez* does not apply to the issue here:

¹⁷ The provision of the State Constitution, art. IX, §17, that no money shall be paid out of the state treasury except in pursuance of appropriations made by law does not restrict appropriations to legislative enactments. There can be constitutional appropriation apart from any action by the Legislature. *Civil Service Commission v. Auditor General*, 302 Mich. 673, 679, 5 N.W.2d 536 (1942). The contrary contention by State Defendants and citation therefore, Brief at 28 n. 16, is incorrect and construes statutory language rather than the constitutional language discussed in *Civil Service Commission*. Regardless, the District Court did not order payment of unappropriated state funds and the remedy ordered is not as the State Defendants continuously mischaracterize it to be.

¹⁸ However, the very State Defendants have admitted that Michigan's educational financing system does violate equal protection. See Brief of State Defendants Milliken and Kelley as Plaintiffs in *Milliken v. Green*, 389 Mich. 1, 203 N.W.2d 457 (1972); 4960a Mich. Sup. Ct. Rec. and Briefs, June Term, 1972 at 56-63. There, these same State Defendants were plaintiffs challenging the constitutionality of Michigan's educational financing and acknowledged that "... no rational basis exists to support the system when tested by the equal protection clauses of the federal and state constitutions." June Term 1972 Brief at 57.

whether co-defendants jointly guilty of violating the Fourteenth Amendment rights of Detroit school children must share in the cost of the remedy for that violation.

The law of this case is that the State Defendants were found to have been a substantial cause of *de jure* segregation in Detroit for which a future remedy must be provided (see pages 5-6, 47, *supra*).

Once the State's action has been determined to have caused the segregation, as in this case, then it is the federal court's duty to require the State Defendants to remedy the segregated condition. *Cooper v. Aaron*, 358 U.S. 1, 4, 16 (1958); *Evans v. Buchanan*, 379 F.Supp. 1218, 1221-22 (D. Del. 1974), *aff'd*, 423 U.S. 963 (1975), *rehearing denied* 423 U.S. 1080 (1976); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 187 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Moreover, the State Defendants must provide the remedy without a resultant curtailment of the educational programs presently in operation in Detroit schools. *Hart v. Community School Board of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

A desegregation plan is a matter of a federal remedy for the violation of a constitutional right. The State Defendants, as adjudicated wrongdoers, may not escape a remedy for school segregation by arguing that their partial financing of the desegregation plan is in contravention of state law. See *United States v. State of Missouri*, 515 F.2d 1365, 1372-73 (8th Cir. *en banc* 1975), *cert. denied*, 423 U.S. 951 (1975); *Wyatt v. Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974). There is nothing in state law which prohibits either the State or the state officers responsible for discharging educational duties imposed upon them by the State Constitution and various legislative acts from assisting financially to operate a constitutional school system. Any contention to the contrary is untrue, makes a mockery of the Supremacy Clause of the Constitution, art. VI, §2 and nullifies *Brown I*, 347 U.S. 483 (1954), *Brown II*, 349 U.S. 294 (1955) and their progeny.

State policy and state law which hinders or impedes constitutional rights must fall. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971).¹⁹

In *United States v. State of Missouri*, 515 F.2d 1365, 1373 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975), the Eighth Circuit *en banc* unanimously reaffirmed the power and duty of a federal court to fashion an effective desegregation remedy, even when that remedy includes "that provision be made for the levying of taxes essential to the operation of" a court ordered multi-district desegregation remedy. The Eighth Circuit did not find a state constitutional provision limiting the amount of school tax levy to be a hindrance in ordering a remedy. Rather, the Court found it "anomalous to suggest that the district court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy". 515 F.2d at 1372.

The State Defendants cannot argue that only the legislature may determine the priority of allocation of state funds, when agencies and officers of the state are guilty of constitutional violations. It is no answer to a constitutional remedy to say that implementing the remedy will cause an adjustment in a government budget. This argument was rejected in *Shapiro v. Thompson*, 394 U.S. 618 (1969), when this Court struck down a one year residency requirement as an unconstitutional denial of welfare assistance by stating that while "a State has a valid interest in preserving the fiscal integrity of its programs . . . The savings of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633. Similarly, the saving of general education dollars in Michigan cannot justify the abstention of the State Defendants from a remedy for the invidious classification of school segregation in Detroit. A similar contention by Alabama officials that the lower court encroached on the pro-

¹⁹ In 1972, for example, the Michigan Legislature mandated that allocations from the school transportation section of the State School Aid Fund to school districts were not to be used for the purpose of busing to achieve a racial balance of students. Mich. Comp. Laws Ann. §388.1179. Such a state prohibition cannot frustrate a constitutional remedy. Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958).

vince of decision-making powers of the legislature was rejected in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

The State Defendants are engaging in legal sophistry when they argue that the District Court's order usurps the legislative prerogative to appropriate state funds. The District Court did not order a money judgment against the state treasury, but rather ordered a remedy for school segregation. It is up to the parties to implement that remedy. The Detroit Board must conform its actions and allocate its budget funds consistent with the constitutional requirements. The State Defendants, the state officials responsible for education in Michigan, must also conform their actions and allocate budget funds consistent with the same constitutional requirements.

The State Defendants have already paid, from appropriated funds, the 5.8 million dollars as their share of the costs of implementing the reading, in-service training, testing, and counseling and guidance programs. The District Court did *not* appropriate any of this money. Rather, the District Court has set forth the requirement that, should the State Defendants choose to continue the state function of education, the delivery of education in Detroit schools must conform with constitutional standards. Constitutional standards require the financial assistance of the State Defendants. Thus, the District Court properly included a joint wrongdoer in a remedy for a joint constitutional violation.

V.

THE DISTRICT COURT'S ALLOCATION OF THE REMEDY BETWEEN JOINT WRONGDOERS PROPERLY CONSIDERED THE PERVASIVE STATE CONTROL OF EDUCATION AND THE CRITICAL FINANCIAL CONDITION OF THE DETROIT BOARD.

The lower courts' requirement that the State Defendants help finance the remedy in Detroit is entirely consistent with the State Defendants' constitutional and legislative responsibility for supervising and financing local school districts in Michigan. In allocating the remedial obligations, the District Court properly considered four facts: the Michigan policy of vesting complete control of education in state officials with state-wide authority; the power of general supervision of local school districts by the State Board of Education; the state constitutional requirement that the Legislature finance education; and the relative ability of the Detroit Board and State Defendants to pay for the costs of desegregation.

Regardless of what may be true in other states, education in Michigan is solely a state function pervasively controlled by the State. The current Michigan Constitution of 1963 provides:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. . . . Mich. Const., art. VIII, § 2.²⁰

Although the Michigan legislature has created local school districts for administrative convenience, the Michigan Supreme Court has consistently held that these local districts are mere instrumentalities and agencies of the state pervasively controlled by the state. *Lansing School District v. State Board of Education*, 367 Mich. 591, 116 N.W.2d 866 (1962) (interpreting art. IX, § 9 of the Michigan Constitution of 1908); *Welling v. Livonia*

²⁰ Michigan's three previous constitutions [Mich. Const., art. X, § 3 (1835); art. XIII, § 4 (1850); art. XI, § 2 (1908)], in addition to the Northwest Ordinance of 1787, contained language substantially the same as the above-quoted constitutional language, and clearly reposed the responsibility for education in Michigan with the state making it no part of the local self-government.

Board of Education, 382 Mich. 620, 624, 625, 171 N.W.2d 545, 546-47 (1969) (interpreting the Michigan Constitution of 1963).²¹

The citizens of Michigan have also required the Michigan Legislature to finance the local school districts. Mich. Const. art. IX, § 11 (1963).

The legislature responded by appropriations of state school aid funds and other taxes to local school districts under certain formulae. Act 258, Mich. Pub. Acts of 1972, Mich. Comp. Laws Ann. § 388.1101, *et seq.*, as amended by Act 2, Mich. Pub. Acts of 1973 (Bursley School District Equalization Act of 1973).²²

²¹ For other cases where the Michigan Supreme Court has clearly and unequivocally held that education is a state function with no part of local self-government, see *Attorney General, ex rel. Kies v. Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902); *Attorney General v. Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908); *MacQueen v. City Commission of the City of Port Huron*, 194 Mich. 328, 336, 160 N.W. 627, 629 (1916); *Collins v. City of Detroit*, 195 Mich. 330, 335-36, 161 N.W. 905, 907 (1917); *Child Welfare Society of Flint v. Kennedy School District*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

²² The Bursley Act provides, *inter alia*, a power equalizing formula to supply a more uniform flow of state revenues to school districts in order to remedy the widely variant per pupil State Equalized Value (SEV) tax yield expenditures on students among the districts. Mich. Comp. Laws Ann. §388.1121. The Bursley Act also provides additional school revenue to districts by recognizing the municipal tax overburden inequities suffered by several school districts. This overburden results in the inability of school districts such as Detroit to raise sufficient millage revenues to deliver equal educational services due to the inability to levy a sufficiently high millage in the face of numerous other municipal taxes shouldered by the taxpayers. Mich. Comp. Laws Ann. §388.1125; (A 23-24; 104-12). The State thus recognizes the need for State officers and agencies to supplement local school revenues with state aid. State aid comprises approximately 50% of the Detroit Board budget.

The Michigan Constitution of 1963 vested the State Board of Education with the power to supervise all local school districts as established by the legislature. The State Board of Education is vested with "leadership and a general supervision over all public education" and the Superintendent of Public Instruction is the "principal executive officer of the State Department of Education". Mich. Const. art. VIII, § 3 (1963).²³ The Governor is an *ex officio* member of the State Board of Education. The powers of the State Board of Education are state-wide and pervasive.²⁴

The Governor retains executive power in Michigan; is authorized to submit a budget to the legislature and amendments to appropriation bills in order to fully fund various programs; and is

²³ The State Board of Education is a body corporate with the power to purchase and dispose of real and personal property of every kind. Mich. Comp. Laws Ann. §§ 388.1007 and 388.1008. As a body corporate, it has the power to borrow money and issue securities evidencing debt. Mich. Const. art. IX, § 13 (1963). Article IX, § 14 of the Michigan Constitution of 1963 grants the Legislature the authority for short term borrowing to meet obligations incurred pursuant to deficient appropriations.

²⁴ The pervasive control of the State over its agents is illustrated by: the many school district consolidations, mergers and annexations which have occurred at the direction of the Superintendent of Public Instruction and the State Board of Education; the Legislature has passed legislation providing for emergency financial relief to various nearly bankrupt school districts (Act 32, Mich. Pub. Acts of 1968; Act 255, Mich. Pub. Acts of 1972; and Act 12, Mich. Pub. Acts of 1973); the State Board of Education has the absolute power to transfer property from one local school district to another. *Lansing School District v. State Board of Education*, 367 Mich. 591, 116 N.W.2d 866 (1962); *Imlay Township District v. State Board of Education*, 359 Mich. 478, 102 N.W.2d 720 (1960); the Superintendent of Public Instruction and the State Board of Education have the power to remove any school board member who refuses or neglects to discharge any of the duties of his office. Mich. Comp. Laws Ann. §340.253; the State Board of Education and Superintendent of Public Instruction may withhold state aid for failure to operate a minimum school year of 180 days. Mich. Comp. Laws Ann. § 340.575; a local school district may adopt only textbooks listed with the Superintendent of Public Instruction. Mich. Comp. Laws Ann. § 340.887(1); during the school year, the local school board's administrative flexibility is further restricted by the limitations imposed by the State Board of Education as the Board enforces its rules covering subjects from state aid payments to teacher certification and tenure to school lunches. See, e.g., R383.151-R383.156; R340.351-R340.355; R390.1101-R390.1167; R340.601-R340.605, *Michigan Administrative Code*.

required to submit bills to meet budget deficiencies in current appropriations. Mich. Const. art. V, §§ 1, 18 (1963).²⁵

The extent of the Governor's control over the Detroit school district is exemplified by the fact that in a January, 1977 message to the State Legislature, the Governor presented his Executive Budget which set forth *his* requirement that the Detroit Board of Education submit its budget for review to the State Department of Management and Budget on an annual basis. Executive Budget, Fiscal Year 1977-78 at J 32. Prior to this directive by the Governor, the Detroit Board was not required to submit its annual budget to the State Department of Management and Budget. No other school district in Michigan is required to do this.

The power vested and the responsibilities imposed on the Legislature (Mich. Const. art. VIII, § 2 and art. IX, § 11 (1963)), the State Board of Education and the Superintendent of Public Instruction (Mich. Const. art. VIII, § 3 (1963)), the Governor (Mich. Const. art. V, §§ 17, 18 (1963)), the Attorney General and the State Treasurer (voting members of the Administrative Board)²⁶, show that the named State Defendants are officials with state-wide responsibility for discharging duties imposed on them by the State Constitution to provide non-discriminatory education in public schools.

²⁵ Mich. Const. art. V, § 15 (1963) provides that the Governor may convene the Legislature on extraordinary occasions.

²⁶ Mich. Comp. Laws Ann. § 12.51 provides for the transfer of monies on deposit in various funds in the state treasury to meet state obligations as they become due. The State Treasurer performs this task with the approval of the State Administrative Board. The Governor, the Attorney General, the State Treasurer and the Superintendent of Public Instruction, all Defendants in this matter, are voting members of the State Administrative Board. This Board arranges for local districts to borrow money, Mich. Comp. Laws Ann. § 388.1231; arranges for a local board to obtain a cash advance to meet operating needs, Mich. Comp. Laws Ann. §§ 388.1236, 388.1238. On November 21, 1972, the Administration Board acted to authorize a cash advance to the Detroit Public Schools when it was on the verge of bankruptcy, thus permitting the schools to stay in operation.

Given the foregoing background of pervasive state control and daily involvement in the operations of education in Michigan generally and in the Detroit school system in particular, the inclusion of the State Defendants in a remedy was consistent with the State's policy of supervising and financing school districts.

Having taken testimony on Detroit's financial condition, the District Court properly took account of the relative ability of the joint wrongdoers to pay the remedial cost of a constitutional educational system.²⁷

Specifically, the Court found that since 1971, the Detroit school system has experienced a severe financial crisis as a result of the loss of property tax revenues by virtue of urban renewal and highway construction, the exodus of businesses and industry to the suburbs and the concomitant outward population flow from the City of Detroit. (A 20). The combination of loss of revenue and escalating educational costs forced the system into what has been termed a "survival" or "suicide" budget. Consequently, the Detroit school system is forced to eliminate many crucial educational services. By 1973, the Detroit school system had accumulated a \$68 million deficit and was within four days of closing its doors due to the lack of funds. (A 15, 66-70).

As a result of special *state* legislation, the Detroit school system was able to finance its debt and continue operations. However, by law, the Detroit Board was required to operate within a balanced budget which has necessitated a continuation of the "survival" budget instituted in 1971. (A 68-69).

Despite the fact that the Detroit system has been under strict state fiscal control since 1973, a 20 million dollar deficit was projected for the 1976-77 fiscal school year. This projected

²⁷ The District Court stated:

The Board operates in a city that has left little room for taxation to operate the school system. . . . Not only is it constitutionally permissible to take these "practicalities at hand" into account in forming a desegregation plan, but it would be irresponsible for this court not to consider such practicalities where the very survival of an already bankrupt school system is at stake. 402 F. Supp. at 1130.

deficit was the result of merely continuing to provide the same minimal services which the Detroit Board provided Detroit public school students in the 1975-76 school year.²⁸ The increased costs for the 1976-77 school year over the 1975-76 school year reflect *no* increase in the level of programs. The additional cost is merely the increased cost of doing business. Thus, absent additional general operating revenue dollars — totally apart from dollars necessary for a desegregation program — programs will have to be, and have been, cut.²⁹

With the August 5, 1976 and November 2, 1976 millage defeats in Detroit, the voters had defeated ten of the last eleven millage elections for additional school revenue. This is due to the fact that Detroit taxpayers shoulder the highest tax burden in the State (A 73-74; 104-112); have the highest municipal tax burden in the state (A 23, 25-26; 73; 115); and pay a higher property tax rate than the state average (A 73).

Another contributing factor in the financial crises of the Detroit Board is the fact that the State has never fully funded the municipal overburden section of the Bursley Act. Mich. Comp. Laws Ann. § 388.1125. Detroit is the major recipient of this

²⁸ The record reveals that "the cost of education is a function of the size" of the school district. (A 26). The Detroit school district with 236,000 students in approximately 300 buildings is the fifth largest school system in the country. The cost/size ratio which applies to the school budget generally applies to the educational component remedy. The educational components cost \$11,645,000 or about \$49.00 per pupil. If the Detroit system had 1,000 students the remedy would cost about \$49,000; if there were 5,000 students, the cost would presumably be about \$245,000.

²⁹ In November, 1976, as a result of a reduction in estimated state aid for 1976-77 and the veto by the Governor of a "declining enrollment" provision which had been included in the state aid bill passed by the Legislature, the Detroit Board took action to cut 7.4 million dollars from the budget in order to balance the projected expenditures with the projected revenue. Since that time, further revenue reductions totalling approximately 2 million dollars in state aid have occurred. Thus, if expenditures are not reduced to offset the additional cuts in revenue, the school district may still have a potential deficit of up to 2 million dollars by the end of the fiscal year.

Contrary to the representation made by State Defendants in their Brief at 35, the State closed the 1976-77 fiscal year with a 28 million dollar *surplus*. According to State Defendants' Brief, this surplus occurred in spite of the payment of 5.8 million dollars incidental to the remedy.

allocation and in recent years it has never been funded to more than 28% of its authorized limit. (RR VII 119, 121).

Faced with a record of financial crises on the part of the Detroit Board and of a state policy of pervasive control and intervention in the day-to-day operation of local school districts by responsible state officials, the District Court framed its equitable relief by "adjusting and reconciling public and private needs",³⁰ noting that "the very survival of an already bankrupt school system is at stake"³¹ and required the State Defendants to share the cost of the educational components. The relief corrects, "by a balancing of the individual and collective interests, the condition that offends the Constitution",³² an unconstitutionally racially segregated school system.³³

There is no argument that in order to exist, the Detroit public schools must be operated and maintained in a constitutional manner. Given the duty imposed upon the State by the Michigan Constitution to provide public education in Michigan and to finance the public school system which is provided, the requirement of the District Court that various responsible State Defendants finance a portion of the additional cost of implementing a desegregation remedy properly falls within the province of the State Defendants and is consistent with the State policy of state control, supervision and financial support of education in Michigan.

³⁰ *Brown v. Board of Education of Topeka*, 349 U.S. 294, 300 (1955).

³¹ *Bradley v. Milliken*, 402 F. Supp., 1096, 1130 (1976).

³² *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

³³ For a complete recitation of the critical financial problems now confronting the Detroit Board of Education, see the Appendix incorporated in the Opinion of the Court of Appeals, 540 F.2d at 247-51; (PA 183a-190a). The findings of fact regarding the Detroit Board's fiscal condition are set forth in *Bradley v. Milliken*, 402 F.Supp. 1096, 1119-21 (E.D. Mich. 1975). For record testimony on the financial condition of the Detroit school system see generally, (A 14-28; 64-80; 84) and exhibits contained at (A 104-21). See also, Detroit Board's Brief in Opposition to Petition for Writ of Certiorari filed in October Term, 1976 at 23-26, wherein an updated discussion of the financial condition of the Detroit Board vis-a-vis the State's fiscal condition was set forth at length.

Once the citizens of Michigan made the voluntary commitment in the State Constitution to educate the children of the State in public schools, neither the Michigan Legislature nor those named State Defendants who are responsible for discharging the duties imposed upon them by the State Constitution can abrogate or escape those duties merely because an incidental monetary obligation is involved.

There has been no problem of enforcing the remedy against the State Defendants. The State Defendants have already paid the required share of the cost of the remedial educational components.

CONCLUSION

Based upon the record in this case, the remedial educational components of reading, in-service training, testing, and counseling and guidance are essential to eliminate the vestiges of segregation in Detroit. The State Defendants were found to be a cause of segregation in Detroit and cannot invoke the Tenth and Eleventh Amendments to shield themselves from participating in the remedy. As a practical matter, with "the very survival of an already bankrupt school system" at stake, these components cannot be implemented in Detroit without the State Defendants' participation. Without State participation there is no desegregation remedy in Detroit. For these reasons, the Order of the Court of Appeals for the Sixth Circuit affirming the District Court's Order as to educational components and their financing should be affirmed.

Respectfully submitted,

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Dated: February 14, 1977

COMPENDIUM OF WRITINGS AND STUDIES ADVOCATING AND SUPPORTING THE INCLUSION OF EDUCATIONAL COMPONENTS AS ESSENTIAL FOR AN EFFECTIVE DESEGREGATION PLAN

WRITINGS AND STUDIES

SYNOPSIS

IN-SERVICE TRAINING:

Clark, Kenneth B., *Dark Ghetto* (1965).

Clark notes at page 132 that stimulation and teaching, based upon positive expectation, seem to play an even more important role in a child's performance in school than does the community environment from which he comes. A key component, Clark argues, of the deprivation which afflicts ghetto children is that generally their teachers do not expect them to learn. This finding suggests the need for in-service training to prepare teachers for the task of educating students from a segregated background by raising the teachers' level of expectation of such children.

Clark, Kenneth B., *Prejudice and Your Child* (1963).

In chapter three, Dr. Clark discusses the detrimental effects of segregation. It has been found that segregation (1) puts special burdens upon members of a minority group by the clear discrepancy between democratic ideals and the actual practice of en-

WRITINGS AND STUDIES

SYNOPSIS

forced segregation; (2) acts as a source of frustration for segregated persons; (3) creates feelings of inferiority, submissiveness and conflicts about the individual's worth; and (4) leads to a distortion of what is real. Similarly, in a later chapter, Dr. Clark asserts that the problem will not immediately be solved if segregated schools are eliminated. Teachers have preconceived, negative ideas of black children, and if these assumptions are not countered, the racial and social burdens upon the minority child increase. In turn, the child who is regarded and treated as a problem becomes a problem.

Dentler, Robert A., *The Urban R's* (1967).

Sol Gordon, at pages 189-204, emphasizes the importance of the teacher's perception of the child's learning ability to the child's performance. Teachers must recognize that school values are a goal, not a prerequisite of learning.

Gerard, Harold B. and Miller, Norman, *School Desegregation: A Long-Term Study* (1975).

This study strongly supports other studies on the necessity of in-service training in desegregating school systems by demonstrating the presence of direct and indirect

WRITINGS AND STUDIES

SYNOPSIS

Green, Robert T. and Virag, Wayne, *Integrating the Desegregated School: A Model for the In-Service Education of School Personnel* (1973) (A paper presented to the National Council for Social Studies Annual Meeting).

Mueller, Mildred K., Minn. Dept. of Research and Evaluation, *The Bryant-Anthony-Ramsey (B-A-R) Project: An Evaluation* (1974).

Bynum, Effie M., and others, National Inst. of Education, Dept. of Health, Education, and Welfare, *Desegregation of the Minneapolis Public Schools, Minneapolis, Minnesota: A Case Study* (1974).

influences of teacher attitudes on student achievement.

The authors emphasize that an in-service program for instructional and administrative personnel must be undertaken to provide additional skills and competencies which will adequately prepare school personnel for the task of educating children in a multi-ethnic classroom.

This study and evaluation of a Minneapolis desegregation project urges in-service training for developing teaching skills in situations involving desegregation.

In this study, researchers from Columbia University conclude that components such as communication skills among teachers, support staff, flexible academic programs, promotion of the team teaching method, and an increasing willingness of teachers to be open with each other and to deal with conflict are key factors in successful desegregation in Minneapolis.

WRITINGS AND STUDIES

SYNOPSIS

Office of Education, Dept. of Health, Education, and Welfare, *Achieving Effective Desegregation* (1973).

South Holland School District 151, Ill., *Winning Public Support of a Desegregated School System. Title III ESEA Progress Report, School District 151 (South Holland, Illinois)* (1975).

Virag, Wayne F., *Integrating the Desegregated School: Some Observations and Suggestions* (Nov., 1973) (A paper presented to the National Council for Social Studies Annual Meeting).

Program for Educational Opportunity, University of Michigan, Conference Proceedings, *A Look at the Education of Teachers: Preservice and In-Service* (1974).

This article points out the need for teacher training and curriculum adaptation for implementing an effective desegregation program.

This report discusses the vital need for staff and administration in-service training and professional enrichment activities in a desegregating school system.

The paper maintains that a key ingredient to achieving an integrated classroom environment is the attitude of teachers. Mr. Virag also argues that, in the past, educational systems have spent little time or resources in preparing staffs for teaching in an integrated climate, and the results have often led to misunderstandings, fear, and hostility among both faculty and students.

(1) Ann Greenstone, at pages 17-20, points out that a child's perception of the teacher's evaluation of the child correlates with the child's self-perception, academic achievement, and

classroom behavior. The author concludes that teachers must be exposed to the history, culture, lifestyles, and experiences of all minority groups to have an effective understanding of their students and an awareness of their students' needs.

(2) Adelfa Arredondo, consultant with the Division of Minority Affairs, Michigan Education Association, at pages 36-41, supports in-service teacher training programs. She argues that a teacher cannot begin to comprehend what a child's educational needs are until he or she knows the child, the child's environment, and becomes familiar with the child's social patterns, beliefs, and ethics.

Program for Educational Opportunity, University of Michigan, Conference Proceedings and Forum Series Papers, *Desegregation and Beyond: The Educational and Legal Issues* (1975).

(1) Dr. Harold Schuler argues that in-service training is necessary to counter racial attitudes formed early in our lives. It also increases sensitivity, on the part of instructional and non-instructional staff, to the problems associated with school desegregation.

(2) At pages 228-230, C. Dwayne Wilson makes the point that, to evaluate a desegregation program, an analysis of certain areas is needed to judge its effect upon minority persons. Key areas are student assignment policies, curriculum revision, in-service training, and community involvement in educational decision-making.

GUIDANCE AND COUNSELING:

Clark, Kenneth B., *Dark Ghetto* (1965).

A survey by the New York State Division of Youth showed that, of the students from Harlem who entered academic high schools in 1959, 53% became dropouts. This finding indicates the great need for proper counseling and guidance. This need is further demonstrated by the open display of contempt by many of these children toward school. This contempt is clearly related, Clark contends, not only to the high dropout statistics, but also to the hostility and aggression of children in Harlem's ghetto schools. Clark theorizes that such children are revolting against a deep and pervasive attack upon their dignity and integrity as human beings. (Chapter 6).

WRITINGS AND STUDIES**SYNOPSIS**

Dentler, Robert A., *The Urban R's* (1967).

Dorothy Schaefer noted a more positive self concept in minority children who attended desegregated schools with remedial services, a guidance program, and special educational facilities for pupils and their families.

Hayes, Edward J. and Rayburn, Wendell G., *Black-White Dilemmas: Counselors, Busing, Desegregation*, School Counselor, Vol. 23, No. 2, pp. 92-102 (1975).

The authors maintain that it is the duty of counselors to avoid confrontation between races by keeping lines of communication open.

TESTING:

Division of Desegregation Studies, National Inst. of Education, Dept. of Health, Education, and Welfare, *Resegregation: A Second Generation School Desegregation Issue* (1975).

In their paper, the authors emphasize how test scores are used to achieve and enhance racial resegregation in education.

Miller, Lamar P., *Testing Black Students: Implications For Assessing Inner-City Schools*, Journal of Negro Education, Vol. 44, No. 3, pp. 406-420 (1975).

The author concludes that it is difficult to separate the issue of testing from the realities which leave black children at the mercy of a unified white majority which is often indifferent to their educational welfare.

WRITINGS AND STUDIES**SYNOPSIS**

Program for Educational Opportunity, University of Michigan, Conference Proceedings and Forum Series Papers, *Desegregation and Beyond: The Educational and Legal Issues* (1975).

The presentation at pages 76-81 by Dr. Horace Mitchell of Washington University, St. Louis, Missouri, scrutinizes various aspects of testing and test instruments including (1) construct validity, (2) concurrent validity, (3) content validity, (4) predictive validity, and (5) reliability. Dr. Mitchell concludes that existing standardized tests have no validity for members of minority groups and suggests, among other things, that teachers, counselors, and school administrators must be better trained to assess students' abilities without the use of involved standardized tests.

READING:

Racial Isolation in the Public Schools (1967) (A report of the United States Commission on Civil Rights).

At page 162 in a section entitled Remedial Assistance, the Civil Rights Commission states that in desegregating schools, remedial programs in reading are necessary to avoid resegregation because "the root of the problem is continued academic disadvantage".

WRITINGS AND STUDIES**SYNOPSIS**

Smith, Al, Downs, Anthony, and Lachman, Leanne M., *Achieving Effective Desegregation* (1973).

This study stresses the importance of instructing teachers in new methods of teaching remedial reading to students who have reading deficits due to racial isolation (p. 131, 234).

Gerard, Harold B. and Miller, Norman, *School Desegregation: A Long-Term Study* (1975).

Chapter 9 advises that in a desegregation setting teachers of reading must recognize the different backgrounds of black and white children and must gear reading programs to accommodate this background.

Bazeli, Frank P., *Delivery of Pupil Evaluation in the Desegregated High School*, *The High School Journal*, Vol. 58 (1972).

Professor Bazeli of Northern Illinois University emphasizes the need to evaluate the reading problems of disadvantaged black students who enter the desegregated high school.

FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

Supreme Court, U. S.

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FEB 14 1977

MICHAEL ROOAK, JR., CLERK

WILLIAM G. MILLIKEN, et al.,
Petitioners,

v.

RONALD G. BRADLEY, et al.,
Respondents.

APPENDIX OF RESPONDENT
BOARD OF EDUCATION FOR THE
SCHOOL DISTRICT OF THE CITY OF DETROIT

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

Petition For Certiorari Filed

September 28, 1976

Certiorari Granted November 15, 1976

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CONTENTS OF APPENDIX OF RESPONDENT**Excerpts from Transcript of Proceedings—Violations Hearings**

Roy L. Stephens	1ar
Dr. Robert Green	4ar
Ernest Marshall	8ar
Dr. Stuart C. Rankin	10ar

Excerpts from Depositions—Violations Hearings

Arthur L. Johnson	13ar
Dr. Norman Drachler	14ar

Designated Exhibits—Violations Hearings

Defendants' Exhibit MMMM	17ar
Plaintiffs' Deposition of Arthur Lee Johnson—Excerpts of Exhibit #5	18ar
Plaintiffs' Deposition of Arthur Lee Johnson—Excerpts of Exhibit #6	19ar

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**RONALD BRADLEY, et al.,
Plaintiffs,**

v

**WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,
Defendants.**

No. 35257

**EXCERPTS FROM TRANSCRIPT OF
PROCEEDINGS—VIOLATIONS HEARINGS**

**TUESDAY, APRIL 6, 1971
(Proceedings)**

ROY L. STEPHENS, having been duly sworn

* * *

(Direct Examination by Mr. Lucas)

[Proc., 53] Q. (By Mr. Lucas) As a Board member were you furnished with achievement data as to the achievement in particular schools and in particular regions?

A. We received the information on achievement data for all schools, all students.

Q. Was the information broken down or given to you along with the race of the pupil, population in the school?

[54] A. Yes, it was. It was broken down school by school and it was clearly indicated from the racial count what the makeup of the school was racially, so, therefore, you can measure achievement of schools that are more than 90 percent black as against the national norm or as against the Detroit city average for Iowa Skills Test or others.

Q. Are you familiar with what was called the center district?

A. Yes.

Q. Can you tell me what the actual composition of the student body of the schools were in the center district?

MR. BUSHNELL: When, in point of time?

MR. LUCAS: '61-'62 count.

A. 95 percent or more black.

* * *

Q. Can you tell us approximately the area, if you recall some of the schools that were in that area?

A. The center district is high schools and junior highs and elementary schools in the center of the city and would include —

[55] Q. At that time.

A. At that time, the feeder schools for Northern, for probably Northwestern and the elementary schools that feed those schools.

Q. Did you examine any data which indicated the level of achievement of the schools in the center region as opposed to other regions which may have had predominantly white enrollment?

A. Yes.

Q. Was there a difference?

A. Yes.

Q. Could you tell us what that difference was?

A. The average achievement in the center district would be probably one and a half to two grades below their normal grade level. If they were eighth graders they would achieve at about sixth grade or less average.

Q. Did the Board —

THE COURT: As against what?

A. As against eighth graders. If they were eighth graders and the national norm was 8.0 —

* * *

[56] MR. LUCAS: How did this compare with the level of achievement in other Detroit schools in predominantly white areas?

A. They achieve at about the national norm, about 8.0.

Q. That would be the schools in the predominantly white areas?

A. Yes.

Q. The differential between the center region and the predominantly white areas was the same as the differential between the center region and the national norm, is that your testimony?

A. Right, about two or three grade levels.

* * *

[58] Q. Do you know whether or not any study was made by you or other members of the Board as to the significance of faculty expectation or attitude with respect to students from these areas that you described?

A. I think in many cases the faculty expectations were that the children couldn't perform. . . . Studies that would reveal this would be the studies that were made by the Equal Opportunities Committee and their hearings and discussions with teachers. In their discussions they concluded that in many cases teachers did not have the belief that the students that [sic] were trying to teach could perform, that is what they reported to us. They didn't have the expectations for the students that would be necessary if you were expecting the student to perform at his best.

WEDNESDAY, APRIL 28, 1971

(Book 9)

DR. ROBERT GREEN, having been duly sworn

* * *

(Cross Examination by Mr. Bushnell)

[Book 9, 988] Q. Let's assume that teachers do come from a range of income backgrounds. Nevertheless, the literature seems to indicate that this attitude of low expectancy of performance on the part of poverty kids is a general attitude of teachers, is that not right?

A. I would not want to say that it is a general attitude on the part of teachers toward poverty children. I would say that in schools that are uni-racial and poor, there is a strong probability that teachers who are assigned to those schools — you know, you talked about the community effect which I said sure, do relate, school communities that have high instances of individuals who are on welfare, as you pointed out, but who are most significantly uni-racial, teachers who are assigned to those schools particularly, they don't perceive that those children will learn as readily as children in Oak Park or children in Livonia, or children in Grosse Pointe.

Q. From higher income backgrounds?

[989] A. Yes, or from predominantly white neighborhoods in Detroit that are middle income, for example. Some teachers even or may hold the same attitudes about poor white youngsters. But, when the variable of blackness is introduced, it seems to become maximized. It becomes maximized, I should say.

* * *

[992] Q. We are talking about an attitude that you testified to yesterday that is supported by the literature.

A. Yes.

Q. That teachers are bound to have that operates negatively against low income kids and operates particularly negative, you tell us, against unilateral low income kids. Now, that attitude or that bundle of attitudes that these teachers have is probably the result of several different things, is it not?

A. It could be, yes.

Q. One of the factors featuring in this attitude is the training that these men and women get in their teacher education courses, is it not?

A. I would say part of the attitude that they bring to that setting as teachers emanates from several sources, one of which would be the failure of the teacher educational institutions to do their job, as I am aware of it.

* * *

[993] Q. The school district that is concerned with this and the school district that recognizes the public studies and the advice of those experienced in the fields should be making every effort to change that attitude, should it not?

A. Yes.

Q. Would you agree with me as a non-educator, — would you, as an educator, agree with me as a non-educator, that if you can find a teacher whose emphasis is on tender loving care and providing success experiences for the kids in her classroom that she is going to have a whale of a lot better results with that child and the child is going to perform at a higher level than would a teacher who comes in thinking because you are poor you can't make it?

A. Yes.

* * *

[1006] Q. The thrust of your testimony yesterday was that these black squares which are predominantly black schools fall below the city-wide mean.

A. Yes.

* * *

[1007] A. Well, the chart shows that schools which are 90 percent black or more are all falling in terms of achievement in the area of the Iowa Test of Basic Skills below the city-wide mean. None exceed the national mean. The schools that are predominantly white, the majority of the schools are above the city-wide mean, and several, one, two, three, four, five surpass the national mean. So, there is quite a discrepancy in predominantly white and black schools in terms of academic achievement.

* * *

(Cross Examination by Mr. Sachs)

[1032] Q. Now, Dr. Green, I'm not sure I followed your line of answers to a line of questioning by Mr. Bushnell. Is it your testimony that black teachers generally bring to bear substantially the same negative attitude as to white with respect to the teaching of students?

A. I said I can find at times a range of attitudes among black teachers that relate to youngsters who are poor in terms of their felt ability to learn, especially when the school is uni-racial. When the school is uni-racial you would find black teachers as well as white teachers who may perceive that the youngsters are not as capable of learning as readily as youngsters — well, we'll take for example as youngsters in uni-racial white schools. The factor looms significantly when you use social class alone. But, when you introduce the [1033] additional variable of race and then color it black, then it becomes even more significant.

* * *

Q. In other words, there is a general common attitude as between the white and black teachers in that situation?

A. Yes, unfortunately. It would be good to say that all black teachers believe all black children who are poor in uni-racial schools can learn. But, that is not the case. This is not to say that white teachers are more virtuous in that regard; they are not.

Q. Have you done any specific investigation of teachers in the Detroit School System with respect to their attitudes?

A. No. But I did a very detailed study of the attitudes that youngsters felt that teachers had about them who were black. But, I did not survey specifically the attitudes that teachers held toward those same youngsters.

* * *

[1034] Q. Does it follow, Dr. Green, that the assignment of black teachers with the negative attitudes of which you speak would not particularly ameliorate an inadequate teaching environment then?

A. The assignment of any teacher, black or white, who holds negative attitudes towards youngsters who are poor, members of a minority group, be they poor, black or white, or poor Chicano or poor you-name-it, is not going to ameliorate that particular set of circumstances that the youngsters might be confronted with from a non-achievement standpoint.

* * *

FRIDAY, JUNE 18, 1971

(Book 33)

ERNEST MARSHALL, having been duly sworn

* * *

(Direct Examination by Mr. Bushnell)

[Book 33, 3603] A. Yes. If I may go back a bit, I came into the counseling [3604] department at the request of the community. The community recognized that in the effort to educate young people education is futile unless they can make the next step in their development, namely the employment or college whatever the next step may be. It was upon this petition to the Board that I came into the Department of Guidance and Counseling.

Q. Mr. Marshall, let's go back to 1939 and talk about your activities in the job of placement and guidance counseling. At that time, sir, was there any effort being made by the Detroit School System or by anyone to place Negro youths in job opportunities?

A. Some effort, but not special effort. The department was not [3605] integrated at that time. We had no Negro counselors in the Detroit School System. Naturally there wasn't anyone concentrating in this area on the particular problem, and in carrying out the Board of Education's policy of equality of opportunity in education, that naturally meant projecting this into the life of the community.

Q. Would you tell us, sir, just as it occurs to you about your activities in that area from 1939 on? What did you do? What businesses were you involved with? Whom did you place, if you remember any individuals? How many kids did you place? Just describe the whole —

A. Well, one of the first things we did was to establish a procedure in the office whereby both Negro youngsters as well as white would be handled by people who were classified as counselors. They indeed would classify these young people and treat them as other young people. We also established that at

that time there were no fair employment laws or anything of that nature. We used what we call moral persuasion to convince employers that young people couldn't benefit from an educational system unless they got a chance to work, which meant going out into industry, trying to develop job opportunities. One of the first things we did was to see who were the primary users of our product, of the kids who were leaving school. One of the prime users of the product was the public utilities. So, one [3606] of the first firms that I approached in regard to integrating their labor force, which at that time the only Negroes they had were those in service categories —

* * *

[3610] Q. This work continued up until World War II, the point you had gotten to in your narrative when I interrupted you. Has that work continued to this day?

A. No. This was discontinued following the Citizens' Advisory Study Committee. At the time we had a different superintendent than we now have under Dr. Brownell, in which we were facing certain financial situations in the schools that required reduction, and it was thought at that time by the Superintendent over the protests of the community that this service could be taken up by the Michigan Employment Security Commission, which commission could receive special sums from the United States Department of Labor to establish the Youth Opportunity Center in the cities, and at that time the Young Opportunity Centers were started.

* * *

[3612] Q. After about roughly 20 years of operation under the school system this program was transferred to the Michigan Employment Security Commission?

A. Correct.

Q. As you have participated and reviewed these programs, Mr. Marshall, how does the administration of this program by MESC compare to the administration by the district which is to say has it become more successful or less successful or maintained at the same level or what?

A. By admission of the MESC as well as documented by the Department of Labor studies, the situation has become worse. Indeed, we are saying now that black youths experience twice the unemployment as the white youth in the inner city of our cities. It is approximately 30 per cent and with youth in — black youth in the inner city it is approximately three times the [3613] unemployment rate of white youth so that we are saying the progress has been very minimal.

Q. Do you perceive this as a problem of the Detroit School System or something that the Detroit School System should respond to?

A. It is most certainly a problem of the total community and particularly the school system because the purpose of education is to train a person for life and to make their next step, therefore, it is a problem we cannot deny and therefore we have the prime responsibility — what I mean by "we", that is the school district has the prime responsibility for educating those youngsters that by law are assigned to it. Therefore, it has the responsibility to help them make the next step and progress in it whether it be college, jobs or whatever.

* * *

WEDNESDAY, JUNE 23, 1971
(Book 35)

DR. STUART C. RANKIN, having been duly sworn

* * *

(Direct Examination by Mr. Bushnell)

[Book 35, 3805] Q. You indicated that there is a variable or variant the school does have some control over, is that what you are saying?

A. Yes. The point is that we in education — you know my whole life is devoted to that; the question as to what can we do with those variables where we do have some control. And we don't have some control of certain variables. So we have to work where we do. Now, if I were to consider the content or the

textbook or the organization of the class or the size of the class or the age of the teacher or a number of other variables along with the behavior of the teacher, in my judgment the behavior of the teacher in the classroom is by far the most potent of those variables. And some of the others may not be important at all. But if I were to try — if my assignment were to try to improve the educational program I would rather put my money on improving the performance of those trying to deliver the service than to changing the textbook or changing the class size, changing the shape of the room or changing the organization schedule.

[3806] Q. I want to come back to that down the pike a bit. But as to those variables over which you as school administrators do have control, it's your testimony that the teacher attitudinal pattern is a significant variable?

A. Well, let me — yes. But let me just say that child does not confront the teacher's attitudes. The child confronts the teacher's behavior. That behavior may be dependent upon the attitude, and I'm indeed interested in that attitude. But it is behavior that the child confronts. So, if you are talking about teacher attitude and behavior, yes.

Q. And it is behavior that you are talking about that can be changed?

[3807] A. Yes.

* * *

[3814] Q. What have we been doing to change teacher behavior patterns?

A. Some, not enough. We have been using some strategies in a few schools like the kind — well, we have done some work where we work on attitude alone. With some of our in-service education programs we have been trying to have our teachers, especially [3815] where you have middle class teachers working with lower class students, often there is the charge that we don't understand that culture and sometimes those charges are partly true and so it is possible to help that teacher understand those things.

Q. Again let me ask you is there a racial component in this statement of your middle class teachers working with lower class kids?

A. There wasn't when I said it. Now that you have asked I think that white people do not look at black people without noticing their blackness and I am reasonably sure black people don't look at white people without noticing their whiteness, and I would not want to sweep race under the table. I believe it is possible for a teacher brought up in a white society to have attitudes about black children that are more likely to group those black children along with poor, you know, in other words, it may be that there are teachers who don't expect the youngster to learn and make that adjustment that they don't expect him to learn partly on the basis of his color. I am not for that.

* * *

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RONALD BRADLEY, et al.,
Plaintiffs,

v

**WILLIAM G. MILLIKEN, Governor
of the State of Michigan, et al.,**
Defendants.

No. 35257

**EXCERPTS FROM
DEPOSITIONS—VIOLATIONS HEARINGS**

MONDAY, NOVEMBER 23, 1970

(Deposition)

ARTHUR L. JOHNSON, having been duly sworn,

* * *

(Cross Examination By Mr. Caldwell)

[71] (By Mr. Caldwell) Q. On page two, paragraph number five, it says "Year around program of prevention and reclamation of dropouts." Has your experience been in the system that you have a larger percentage of black dropouts than white dropouts?

A. That is true. I cannot say that has been consistently the case, but the system is now a majority black system. So that factor alone, in part, determines that the —

[72] Q. You will have more numbers, at least?

A. Yes. But at the same time, I am sure that, from the standpoint of the socioeconomic problems and psychological problems that are related to the behavior of a student who drops out of school, these are concentrated more in the condition of black students than they are the average white students.

MONDAY, JUNE 28, 1971

(Deposition)

DR. NORMAN DRACHLER, having been duly sworn

* * *

(Direct Examination By Mr. Bushnell)

[113] Q. One other question along this line and that speaks to tracking. What is tracking and do we track in the Detroit Public School System?

A. Tracking is usually referred to as having within a school system [114] a program that very early in the senior high school or late in the junior high school predetermines what academic program a youngster will take and what his life career in a sense shall be as a result of this deliberate tracking system. We have had at the time of the Citizens Committee in 1957-58, and at the time of the 1961-62 charges that in our high school we do track youngsters, that is, we say to a given youngster in the eighth grade when he has to enter junior high school:

"You ought to be in a non-college bound program." And we tell another youngster or advise him that he ought to be in a college-bound program. At one time we even said to certain youngsters, "You can not take algebra in the ninth grade, you must take general math because you have not demonstrated thus far college caliber."

* * *

[115] * * * If officially tracking is unacceptable and verboten in the Detroit School System I can not say there may not be those teachers or those counselors who may, based on their best judgment, encourage youngsters into certain programs and that if that is based on their best educational judgment then it is good counseling. Although I [116] have taken officially the position that it is not our task as educators to counsel a youngster into a program or out of a program, our obligation is to counsel. We can lay before the student the best facts that we know, the decision should be made by the student himself. * * *

I believe our counseling hasn't been as effective as it ought to be and I am not blaming counselors for it, the conditions, and

numbers and so on also influence that, so that we have a situation where although tracking officially [117] does not exist there are — excuse me — there isn't enough flexibility in our program in my opinion, there is not enough flexibility to, in order to avoid the kind of open doors which eventually lead students into programs that they end up not being tracked but being trapped in not having a desirable program.

* * *

[141] A. I referred to that earlier. As we look back in 1966, and as I look at our most recent data today, the fact book that you have seen for each individual school, there are three or four constant factors that relate to quality education and one of them is absenteeism on the part of youngsters.

Q. Let me interrupt. What are the causes of absenteeism? Is it simple truancy or what?

A. We make about 200,000 home calls a year in Detroit, our [142] Attendance Department does. To the best of our knowledge over 40 per cent of it deals with poverty of some sort or another. It's not just plain truancy. A youngster is ill, they do not have a doctor, they can't get glasses, they don't have shoes, the mother is working and the younger brother is ill and somebody had to stay with him while she was at work. They even have personal problems in terms of health which affect the children.

If one were to place or rank the schools of Detroit from the lowest in achievement to the highest there is no question that children in the lower achieving schools would have a greater deal of absenteeism and the opposite would be the other end.

* * *

(Cross Examination By Mr. Lucas)

[159] Q. Since you have expressed fairly firmly opposition to tracking and since there seems to be difference of opinion about it from the High School Study Commission report and others, would you indorse or have any opposition, as an administrator, to a requirement in a court order that there be no tracking, and I

say to you the court in San Francisco put that in as a requirement without dealing in any great detail of the issue. As an order would you support such a thing?

A. I certainly would support it. It is not an educationally sound procedure.

[160] Q. That is really what I wanted an answer to, the other gets into a lawyer's argument.

A. Whether the court should do it or not I don't want it because it is not educationally sound.

**UNITED STATES DISTRICT COURT
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Plaintiffs,

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of the State of Michigan, et al.,**
Defendants.

No. 35257

**DESIGNATED EXHIBITS — VIOLATIONS HEARINGS
DEFENDANTS EXHIBIT MMMM**

APPROVED BY THE DETROIT BOARD OF EDUCATION
December 18, 1962

SUBJECT: The Treatment of Minorities
FROM: Superintendent S. M. Brownell
TO: Members of the Board of Education
DATE: December 18, 1962

To the Board of Education:

* * *

Criticisms have come to this Board to the effect that some textbooks in use today do not present a balanced and satisfactory picture of all groups in American life. This condition prevents all children from acquiring an adequate understanding of America's growth and development. Progress has been noted in this regard in recent years, but the progress is small and much yet remains to be done. Investigation by staff members of the Board of Education tends to support the need for textbooks and other instructional materials that portray American life in a more adequate manner.

* * *

**PLAINTIFFS' DEPOSITION OF
ARTHUR LEE JOHNSON**

**NOVEMBER 23, 1970
EXCERPTS OF EXHIBIT #5**

**REPORT OF PROGRESS
CITIZENS ADVISORY COMMITTEE ON
EQUAL EDUCATIONAL OPPORTUNITIES**

Detroit Public Schools

September 28, 1965

CURRICULUM AND GUIDANCE

* * *

32. EVERY SCHOOL SHOULD ESTABLISH AN IN-SERVICE EDUCATION PROGRAM WHICH FOCUSES ON UNDERSTANDING THE COMMUNITY AND LEARNING HOW TO IMPROVE THE SCHOOL EXPERIENCES OF CHILDREN WITH DIFFERENT CULTURAL BACKGROUNDS.

In each school, a human relations building chairman is selected at the beginning of the school year. These chairmen attend regional and city-wide meetings where the need for understanding the community and for improving the learning experiences of culturally different children is emphasized. Each building chairman is expected to plan, with the cooperation of the administration and the total staff, activities within the school which will contribute to this kind of understanding. Reports from schools indicate a variety of such activities, some more meaningful than others.

* * *

**PLAINTIFFS' DEPOSITION
OF ARTHUR LEE JOHNSON**

**NOVEMBER 23, 1970
EXCERPTS OF EXHIBIT #6**

**REPORT OF RECOMMENDATIONS OF
TASK FORCE ON QUALITY INTEGRATED
EDUCATION IN DETROIT SCHOOLS**

September 13, 1967

**Detroit Public Schools
Detroit, Michigan**

* * *

[11] C. *Special Staff on Achievement Programs*

In Detroit Schools there is a serious problem of a lack of commitment among many administrators and teachers to the ideal that all children can learn and achieve. This is a deficit which critically affects the learning experiences, possibilities, and achievements of minority-group children in particular. Policies, procedures, and evaluation techniques designed to control and to minimize the effects of this deficit of commitment are clearly inadequate, and the need for effective corrective measures is urgent.

* * *

[15] B. *Proposal to Establish Neighborhood Education Centers in Disadvantaged Areas of the City.*

* * *

One segment of our population, however, has — for various reasons — been unable to perceive a high-school diploma as being the key which unlocks the door to the "good", productive, socially acceptable life. The high-school "drop-out" or "push-out" remains as an ever-present reminder of the fact that equality of educational opportunity is still a dream and not a reality for many students. These are youngsters for whom the schools have *not* met their educational needs.

There seems to be little doubt that the inner-city Negro student is more often the school drop-out than is his more

privileged counterpart in the predominantly white fringe areas of the city. An examination of the [16] October 1966 racial count of the Detroit Public Schools reveals that the proportion of Negro students is significantly lower in the senior-high grades than in the elementary schools of the city: approximately 62 per cent of the students in the third grade were Negro compared to 43 per cent in grade 12. While there may be factors other than the drop-out rate which influence these statistics, nevertheless there is supporting evidence in the school-by-school withdrawal reports to indicate that inner-city youth, most of whom are Negro, fall more frequently than others in to the "drop-out syndrome" which seems to be a part of their school and community life.

This proposal is for a new and creative approach to the problem of school drop-outs in the inner city. It is based on two assumptions:

(1) That *some* inner-city students drop out of school because the organizational structure of the school is not educationally functional for them. They become lost in the masses of students, unable to cope with the formalized routines, the "bureaucracy" of the school institution. Their individual needs are not being met to a great extent because they have been unable to project these needs onto the consciousness of their teachers and administrators. Back-to-school campaigns for such students are unsuccessful because the school they return to is not significantly different from the school they left.

(2) That, in some neighborhoods, students tend to remain in school because it is the usual and accepted pattern of life in that neighborhood, while in others, the drop-out is visible, acceptable, and not unusual. Indeed, the drop-out [17] may be providing a positive role-model for younger children to emulate. In such neighborhoods, the social climate of the *neighborhood*, which is acceptive of the drop-out, may mitigate against the value which individual parents place on completing school.

* * *

[24] D. *The Ghetto Junior High School in the Inner City*

Junior high school students in the Negro inner city have all the educational and psychological needs of inner city children at any school level, and in addition they must try to cope with the special emotional demands of early adolescence. Many are combustible in one way or another, and their educational and social performance reflects it. Fourteen and fifteen year old psychological drop-outs may be sitting in the classrooms, or they may become actual physical drop-outs manifested by truancy.

The effects of early school failing pile up to a negative and even antagonistic attitude toward the institution called "school" and to the adults who perpetuate the school experience. Expressions of frustration become more violent or disassociation becomes more severe.

Changing the attitudes and the quality of school performance of the young people of this age, the "now or never" chance for many, is the job which the junior high school approaches with many handicaps. For the promotion of the educationally retarded and the "late bloomers," the following should increase [25] the possibilities of success:

* * *

Teacher Education

Concentrate in-service education efforts on developing positive teacher attitudes and on improving the students' self-images.

Note: Inasmuch as these are two critical components of successful teaching, we need to apply ourselves to both with extreme effort.

* * *

[26] A chance for every child to succeed in some way, and thereby enhance his self-image, could come from teacher education and planning not only in the traditional instructional areas but also in opportunities provided for creative thinking, independent study to stretch maturity, exploration

of job opportunities in whole city community, and experiences in self-determination.

* * *

[31] D. *Student Grouping*

* * *

However, the Task Force questions those kinds of ability grouping at all levels which are based on an assumption of general mental ability, and which lead to relatively permanent grouping of students on a presumption of high or low general ability.

Education for children must consist in the continuing search for all kinds of ability to learn, and an expectation that each child will perform to the maximum of his ability.

Placement of a student in a class or in a track or sequence of courses with other students who are presumed to have low ability results in low expectations for both individual and the class. It results in low morale for the teacher and a stultifying atmosphere for learning.

The Task Force also questions the educational validity of grouping-approaches like the Science and Arts program which are based on an assumption of high general ability. These programs have the practical consequences of draining off from some schools and programs many of the students with special abilities who could serve as models for motivation of other students within those schools.

* * *

[34] F. *Changes in Testing Procedures*

The total Detroit public school enrollment as of October 1966 was 297,035. Of the total, 168,299 were Negro. These Negro children were and are concentrated in schools commonly designated by euphemisms such as "inner-city schools," "culturally disadvantaged schools," or "the

One-Seventy-Eight." The academic achievement of this group of children, on the average, ranges from one and one-half to three years below the levels of their white counterparts attending schools located on the periphery of the city.

The California Test of Mental Ability tests used from grade 1 through 7 in the Detroit Public Schools measures verbal meaning, perceptual speed, number facility, and spatial relations. Because children of the lower socio-economic backgrounds are children suffering from what Martin Deutsch calls cumulative deficit, they have greater difficulty than other children with these mental abilities tests as well as with achievement tests. The mode of communication used in the school setting is more than likely to create frustration if not panic.

* * *

Some of the several possible negative effects are indicated as follows:

1. There is damage to ego development and healthy self-concept.
2. Children "locked in" with slow learners often present discipline problems.
3. As children move through the grades, this cumulative effect may be intensified.
4. At the junior-high level, there is often grouping or assignment to homerooms based on "ability" as indicated by test scores. We have already questioned this procedure.
- [35] 5. Defeatism sets in and motivation is stymied.
6. Schools involved in Project II often pair youngsters as pen pals based on the results of mental abilities testing. Again, we question this basis of pairing.
7. If and when transportation is used to relieve overcrowding, school records will be sent to receiving schools; premature judgments may be formed which would affect curriculum offerings.

* * *

FOR ARGUMENT

Supreme Court, U. S.
FILED

MAR 10 1977

MICHAEL BOGAL, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al,

Petitioners,

v.

RONALD G. BRADLEY, et al,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS MILLIKEN, ET AL

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. 76-447

WILLIAM G. MILLIKEN, et al,	Petitioners,
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RONALD G. BRADLEY, et al,	Respondents.

On Writ of Certiorari to the United States Court of
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REPLY BRIEF OF PETITIONERS MILLIKEN, ET AL

INTRODUCTION

This reply brief is filed on behalf of petitioners Governor, Attorney General, State Treasurer, State Board of Education and Superintendent of Public Instruction, all of whom are officials or boards in the executive branch of state government in Michigan.^[1]

[1]

Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al," and individually by the title of their offices, i.e., "Governor," "State Board," etc.; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board," and respondent Detroit Federation of Teachers, Local 231, intervenor below, will be called "Federation."

The filing of this reply brief is occasioned by the briefs of plaintiffs and the Detroit Board which contain inaccurate statements and raise for the first time in this case, in this Court, new contentions neither raised nor considered below. These new contentions relate to the alleged waiver of Eleventh Amendment immunity pursuant to federal or state statutes and, failing that, a plea that this Court reverse almost 90 years of settled Eleventh Amendment jurisprudence dating back to *Hans v Louisiana*, 134 US 1 (1890). See plaintiffs' brief, pp 38-44, and Appendix A, and the Detroit Board's brief, pp 61-76. As a general rule, this Court will not consider contentions raised for the first time in this Court. *Lawn v United States*, 355 US 339, 362 n 16 (1958). This general rule, petitioners submit, is applicable here and should be observed.^[2] Assuming *arguendo* that this Court will consider these new contentions, petitioners will, later in this brief, demonstrate that under established case law such new contentions are without merit.

[2]

The Detroit Board's brief, at p 45, makes the erroneous assertion that petitioners have never raised the Tenth Amendment herein until their petition for a writ of certiorari on September 24, 1976. Petitioners raised the Tenth Amendment and *Bradley v School Board of Richmond, Virginia*, 462 F2d 1058 (CA 4, 1972), *aff'd* by equally divided court, 412 US 92 (1973), a case decided thereunder, in their brief in this Court in *Milliken v Bradley*, 418 US 717 (1974). Further, *National League of Cities v Usery*, US; 96 S Ct 2465 (1976), was decided on June 24, 1976, after the briefs were filed and oral argument had taken place in the Court of Appeals below. Petitioners raised *Usery*, *supra*, in their petition for stay in the Sixth Circuit Court of Appeals.

I.

PLAINTIFFS' POSITION IN THE COURTS BELOW AND IN THIS COURT WITH REGARD TO THE "EDUCATIONAL COMPONENTS" IS MANIFESTLY INCONSISTENT.

During the remedial proceedings following this Court's remand in *Milliken v Bradley*, *supra*, plaintiffs' counsel argued in the District Court that the constitutional violations herein were not with respect to the educational program areas encompassed by the "educational components."^[3] (R June 26, 1975, 131) Consistent with that position, plaintiffs' desegregation plan filed below dealt solely with pupil reassignment. It contained no "educational components." (PA 24a) Plaintiffs' expert witness, who prepared such plan, testified that the plan eliminated segregation in the Detroit city schools in conformity with this Court's remand of this cause. (A 58) On appeal, plaintiffs informed the Court of Appeals, in their brief, that the "educational components" were "wholly unrelated to desegregation

[3]

Hereafter, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the volume number and the page number, e.g., (A 12).

Record of the remedy hearings covering the period from April 29, 1975 to June 27, 1975, "R" followed by the volume number and the page number, e.g., (R I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

of students and faculty in schools." See main brief of petitioners, *Milliken, et al*, at pp 18-19. '

For the first time in this Court plaintiffs now claim that the "educational components" are necessary aspects of relief herein. Such claim is patently inconsistent with plaintiffs' conduct in the lower courts.

II.

THE POSITION OF THE DETROIT BOARD HEREIN WITH REGARD TO THE EDUCATIONAL PROGRAMS PROVIDED BY IT TO ITS STUDENTS IS PATENTLY INCONSISTENT.

Following the violation trial in this cause, the Detroit Board submitted its brief to the District Court under date of July 28, 1971. In its post-trial brief, the Detroit Board claimed the following:

1. "THE DETROIT BOARD OF EDUCATION DOES NOT DENY AN EQUAL EDUCATIONAL OPPORTUNITY TO ANY OF ITS STUDENTS." Brief, p 77
2. "Variations in Achievement Levels are Due to Socio-Economic Status not Race or Acts of the Detroit Board of Education." Brief, p 81
3. "The Detroit Board of Education Does Not Deny Any Child an Equal Educational Opportunity by Depriving him of Equal Educational Resources." Brief, p 83
4. "Schools Wherein Black Students Predominate Are Not, For That Reason Alone, Inferior Schools Either in Fact or as Perceived by the Community." Brief, p 88

Moreover, in the subsequent violation opinion of the District Court, *Bradley v Milliken*, 338 F Supp 582 (ED Mich, 1971), the trial court made no finding of any constitutional violation with regard to the scope and content of educational programs within the Detroit school system.

However, in this appeal the Detroit Board takes a contrary position, arguing that the "educational components" are necessary to remedy alleged educational inequities of its own creation in the Detroit school system. See the Detroit Board's brief in opposition to certiorari, p 9, and its subsequent brief on the merits, p 15. This change in position is clearly designed to unlock the State Treasury.

Obviously, the Detroit Board does not need any federal court order to expand its existing educational programs with regard to in-service training, testing, guidance and counseling and reading. The court order is needed only if additional, unappropriated state funds are to be secured from the State Treasury by federal judicial decree.

III.

THERE IS NO CONSTITUTIONAL VIOLATION HEREIN TO SUPPORT THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS DECREED BELOW.

The view of respondents herein concerning violation and remedy is very elastic. Previously, respondents attempted to stretch a single school district pupil assignment violation into a massive multi-school district pupil reassignment remedy embracing 54 school districts and affecting 779,000 pupils in a three county area. *Milliken v Bradley, supra*, 418 US, at 729, 733 n 14, 752. Currently, respondents are attempting to strain

a pupil assignment violation into a remedy compelling the system wide expansion of existing educational programs financed with unappropriated state funds. In respondents' view, once a pupil assignment violation has been found, the chancellor, in framing relief, somehow assumes all of the educational and financial powers of the locally elected school board and the elected state legislature.

Under the established precedents of this Court, "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v Bradley*, *supra*, 418 US, at 744. The appropriate remedy for unlawful attendance patterns is pupil reassignment. Once that has been accomplished the judicial function has been fully performed. *Pasadena City Board of Education v Spangler*, US; 96 S Ct 2697, 2705 (1976). These controlling precedents have not been followed below in this cause.

In the violation decision herein, after reviewing all of plaintiffs' evidence offered at trial to prove alleged violations, the District Court found a violation only with respect to pupil assignment. The trial court held that there was no violation with regard to faculty assignment. The District Court made absolutely no finding of any constitutional violation with regard to educational programs or the allocation of educational resources and opportunities within the Detroit school system. Moreover, the District Court made no findings concerning the academic achievement levels of students in the Detroit school system. *Bradley v Milliken*, 338 F Supp 582 (ED Mich, 1971). Since there has been no adjudication in this cause of a Fourteenth Amendment violation as to the scope and content of educational programs in the Detroit school system, the court ordered expansion of existing educational programs decreed below should be reversed.

The plain wording of the District Court's memorandum

remedy opinion of May 11, 1976, concerning the educational components demonstrates that the Court was concerned, not with pupil reassignment for a unitary school system, but with the "quality of education" in the Detroit school system. In the concluding portion of such opinion, the trial court summarized its perception of desirable educational goals as follows:

"The judgment entered on this date will provide the Detroit Board of Education with sufficient lead time to plan for an implement the components mandated. *Besides adding several new components, we have sought to strengthen those programs now in existence.* In entering our judgment today, we acknowledge our awareness that this litigation must be finalized. The school system must be afforded the opportunity to devote its energies to *perfecting the education of Detroit school children*, something it has not been able to do since this litigation began. The entry of our judgment today should also advise a troubled community *that the court is indeed concerned with the quality of education in a system undergoing desegregation.* The school district must, if necessary, adjust its priorities to accommodate the cost of the educational components mandated so *that the children of Detroit will reap the benefits of a greatly improved educational system.* It is our hope that the judgment, together with the numerous orders we have previously entered, will provide the community and the school system with an opportunity *to fulfill their educational aspirations.*" (emphasis added) (PA 135a-136a)

The Court of Appeals enunciated its own perception of desirable educational goals in terms of the "motivation and achievement levels which the desegregation remedy is designed to accomplish." (PA 171a) These educational concerns provided the Court of Appeals with its rationale for affirmance.

Clearly, the above quoted language demonstrates that the lower courts acted according to their respective notions of desirable educational policy unrelated to constitutional requirements. *Keyes v School District No 1, Denver, Colorado*, 521 F2d 465, 483 (CA 10, 1975), *cert den*, 423 US 1066 (1976). Quality education is a general educational goal of citizens, parents and public officials in the executive and legislative branches of state and local government. However, quality education is not a protected right under the Constitution to be secured by the federal courts. *San Antonio Independent School District v Rodriguez*, 411 US 1, 35 (1973).

For example, the court ordered employment of elementary school counselors manifestly does not restore anyone to the position he would have occupied in the absence of unlawful pupil assignment conduct. See petitioners' main brief, at p 13 n 9, and *Milliken v Bradley*, *supra*, 418 US, at 746. Rather, such order simply expands the existing junior and senior high school counseling program of the Detroit school system to the elementary school level in accord with the lower courts' perception of desirable educational policy. There is no constitutional right to elementary school counselors in the public schools. *San Antonio Independent School District v Rodriguez*, *supra*, 411 US, at 35.

The four "educational components" here at issue were ordered into effect nine months after peaceful implementation of pupil reassignment, on a system wide scale far exceeding the number of schools involved in pupil reassignment. See petitioners' main brief at p 14. Thus, there is simply no relationship between pupil reassignment and these "educational components." Rather, the components represent the lower courts' attempt to impose educational policies by judicial decree in the absence of any adjudicated educational violation.

For the first time in this case, in this Court, plaintiffs con-

tend, at pp 27-28 of their brief, that there is express congressional authorization for the inclusion of the four "educational components" here at issue in judicially imposed school desegregation remedies. However, that contention must fall based upon an examination of the federal statutes relied upon by plaintiffs.

The statutory provisions relied upon by plaintiffs, 20 USC 1601 *et seq*, the Emergency School Aid Act, constitute a congressional appropriation of federal funds to school districts undergoing court ordered desegregation or voluntarily eliminating minority group isolation. 20 USC 1603, 1605. This statute provides federal funds for auxiliary programs rather than for basic desegregation activities. *Kelsey v Weinberger*, 498 F2d 701, 711 (CA DC, 1974). There is no language in the statute authorizing the federal courts to require any of these auxiliary programs or to require payment for such programs with state funds in school desegregation decrees.

Turning to 20 USC 1701 *et seq*, the Equal Educational Opportunity Act of 1974, we find the Congress specifying appropriate remedies for the elimination of dual school systems, consistent with the authority of the courts to enforce the Fourteenth Amendment. 20 USC 1702 (b). In 20 USC 1712-1718, the appropriate judicial remedies set forth by the Congress concern pupil reassignment. Congress did not authorize court ordered educational program expansion as an appropriate judicial remedy in school desegregation cases. In short, Congress has not authorized the federal courts to require either "educational components" or the financing of same with state funds in school desegregation remedial orders.

In summary, the system wide expansion of existing educational programs ordered below is unsupported by any adjudicated educational violation in this cause. The lower courts, acting solely upon their own perception of desirable educa-

tional policy, have assumed control of curriculum in the public schools without any authorization for such control in the Constitution, the decisions of this Court or congressional legislation. The lower federal courts lack the power to control public school curriculum, regardless of how much a local board of education may approve of court orders directing that court ordered curriculum expansion be financed with additional, unappropriated state funds.

IV.

THE COERCIVE FINANCIAL RELIEF ORDERED BELOW, COMPELLING PAYMENT OF 5.8 MILLION DOLLARS IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY, IS A MONEY JUDGMENT AGAINST THE STATE OF MICHIGAN PROHIBITED BY THE ELEVENTH AMENDMENT.

The Court of Appeals opinion here under review states that “[w]e see no reason at this time for upsetting the judgment that the State of Michigan pay 50 percent of the costs of the desegregation plan to the extent prescribed by the District Court.” (PA 180a) Subsequently, petitioners sought and were denied a stay. Thereafter, that money judgment was satisfied for the 1976-1977 school-fiscal year when, on October 18, 1976, the State Treasurer transmitted to the Detroit Board a warrant drawn on the State Treasury in the sum of \$5,822,500 although the legislature had not appropriated the moneys therefor. See Mich Const 1963, art 9, § 17. The above sum represented 50 percent of the cost of implementing the four “educational components” here at issue, as computed by the Detroit Board, for the 1976-1977 school fiscal year.

The “educational components” here at issue will be implemented by persons employed, paid and assigned by the Detroit

Board of Education based on the educational program submissions of the Detroit Board ordered into effect. (PA 127a-131a) *Milliken v Bradley*, *supra*, 418 US, at 742-743 n 20. Thus, the money judgment entered below was paid from the State Treasury to the Detroit Board of Education in conformity with such judgment.

Respondents’ claim, that this coercive financial relief is merely prospective injunctive relief with an ancillary effect on the State Treasury, is akin to claiming day is night and night is day. The judicial decree was to pay money and, indeed, the decree was satisfied by the payment of unappropriated moneys from the State Treasury. Absent such payment, it is clear that there would not have been compliance with the money judgment decreed below.

Here, as in *Edelman v Jordan*, 415 US 651, 668 (1974), the prohibited relief is a direct money judgment to be paid from state funds as a form of compensation for the claimed effects of the alleged prior wrongdoing of defendant state officials. (PA 170a, 178a, 180a) The effect on the State Treasury is direct, not ancillary. Thus, the coercive financial relief decreed below is violative of the Eleventh Amendment.

V.

CONGRESS HAS NOT ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN 20 USC 1701 ET SEQ.

For the first time in this case, in this Court, plaintiffs claim, at pp 38-41 of their brief, that pursuant to 20 USC 1701 *et seq*, the Equal Educational Opportunity Act of 1974, the Congress has abrogated the Eleventh Amendment immunity of the State of Michigan by authorizing suit in federal court against peti-

tioner, State Board of Education. 20 USC 1720(a), 881(k). That claim, we submit, is clearly erroneous.

In *Edelman v Jordan*, *supra*, 415 US, at 675-677, this Court rejected the argument "that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." So here, the purported authorization to sue one state agency, the State Board of Education, in federal court, does not exhibit any congressional intent to abrogate the Eleventh Amendment immunity of the states, since the statute does not authorize suits against the states.

In *Milliken v Bradley*, *supra*, 418 US, at 722, this Court recognized that, although the State Board of Education is a party defendant herein, the "... State of Michigan as such is not a party to this litigation ...". However, since the relief decreed below is the payment by the State Treasurer of unappropriated funds from the State Treasury, the State of Michigan "... is entitled to invoke its sovereign immunity from suit ...". *Ford Motor Co v Department of Treasury of Indiana*, 323 US 459, 464 (1945).

In *Fitzpatrick v Bitzer*, ... US ...; 96 S Ct 2666 (1976), this Court held that Congress may, pursuant to § 5 of the Fourteenth Amendment, enact legislation abrogating the Eleventh Amendment immunity of the States. The necessary predicate for this doctrine is a finding of congressional intent to abrogate Eleventh Amendment immunity.

In *Fitzpatrick v Bitzer*, *supra*, the statute before this Court expressly authorized suits against State governments as employers and expressly authorized the courts to grant both back-pay awards and attorney fees. In contrast, 20 USC 1701, *et seq*, does not authorize suits against the States. Indeed, the most

that respondents claim is that it authorizes suits against state boards of education based on 20 USC 1703, 1720(a) and 881(k). Further, the remedial provisions of 20 USC 1701 *et seq*, see 1712-1718, are limited to pupil reassignment. Such provisions authorize neither judicially decreed "educational components" nor judicially compelled payments from state treasuries. Thus, both as to parties and the scope of relief, it is clear that 20 USC 1701 *et seq* does not exhibit any congressional intent to abrogate the Eleventh Amendment immunity of the states.

Moreover, the challenged relief decreed herein is directed at the "state defendants" or the "State of Michigan." (PA 146a-147a, 180a). It is not limited to petitioner, State Board of Education. Further, the coercive financial relief was implemented by petitioner, State Treasurer, a party defendant joined after conclusion of the violation phase of this litigation for remedy purposes. See petitioners' main brief at p 15 and the brief of plaintiffs at p 4, n 1.

Assuming *arguendo* that the provisions of 20 USC 1701 *et seq* were intended to abrogate the Eleventh Amendment immunity of the states, the retrospective application of such statute, passed in 1974, to a case commenced in 1970 and tried on the merits in 1971, would create manifest injustice. See *Bradley v School Board of the City of Richmond*, 416 US 696, 716-721 (1974). Although the statute in question was enacted in 1974, plaintiffs failed to invoke the statute in this cause until this appeal in 1977. See brief of plaintiffs, at p 41, n 27. Further, since the statute in question would, as interpreted by plaintiffs, strip the State of Michigan of important constitutional rights under the Eleventh Amendment, a consequence not heretofore raised in this case, retrospective application would constitute manifest injustice.

VI.

THERE HAS BEEN NO STATE STATUTORY WAIVER OF ELEVENTH AMENDMENT IMMUNITY AS TO PETITIONER, STATE BOARD OF EDUCATION.

For the first time in this case, in this Court, respondents claim a state statutory waiver of immunity as to petitioner, State Board of Education, relying upon the opinion in *Oliver v Kalamazoo Board of Education*, F Supp, No. K-88-71, (WD Mich, November 5, 1976), appeal pending. See plaintiffs' brief, pp 41-42, and the Detroit Board's brief, pp 73-76. That claim, as will be demonstrated below, is without merit.

In *Oliver, supra*, the trial court awarded attorney fees against the State Board of Education pursuant to 20 USC 1617 and *Fitzpatrick v Bitzer, supra*. Thus, the language of the opinion concerning an alleged waiver of Eleventh Amendment immunity by state statute is, at best, gratuitous dictum.

This Court has consistently held that it will find a waiver of a state's constitutional protection under the Eleventh Amendment only where the state has *expressly* and *clearly* demonstrated its intent to submit its fiscal problems to the federal courts. *Edelman v Jordan, supra*, 415 US, at 673. Under that controlling test, it is clear that there is no state statutory waiver applicable herein.

In MCLA 388.1007; MSA 15.1023(7), the Michigan legislature has provided as follows:

"The state board of education is a body corporate and . . . may sue and be sued, plead and be impleaded in all the courts in this state"

The above quoted language contains no express language concerning the federal courts. Further, the federal courts constitute a nationwide system of courts not confined to a single state. In addition, this Court has construed state statutory provisions containing language somewhat similar to that quoted above as not constituting a clear waiver of sovereign immunity. *Chandler v Dix*, 194 US 590, 591-592 (1904); *Kennecot Copper Corp v State Tax Commission*, 327 US 573, 575 n 1, 579, 580 (1946). See also *Hamilton Manufacturing Company v The Trustees of the State Colleges in Colorado*, 356 F2d 599, 601-602 (CA 10, 1966); *Oklahoma Real Estate Commission v National Business and Property Exchange*, 229 F2d 205, 206-207 (CA 10, 1955).

Most importantly, the money judgment relief decreed herein is not limited to petitioner, State Board of Education. It is directed to the "state defendants" or the "State of Michigan." (PA 146a-147a, 180a) Further, the money judgment was paid, not by the State Board of Education, but by the State Treasurer, a party joined after conclusion of the violation phase of this litigation for remedy purposes. See petitioners' main brief at p 15 and the brief of plaintiffs at p 4 n 1. There is no basis for any claim of statutory waiver as to either the state treasurer or the State of Michigan.

VII.

THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES HAS NOT BEEN REPEALED BY THE FOURTEENTH AMENDMENT OR ABROGATED BY CONGRESSIONAL ENACTMENTS.

For the first time in this case, in this Court, in plaintiffs' brief, pp 42-44 and Appendix A, and the Detroit Board's brief, pp 61-73, several more new contentions have been raised as

to the applicability of the Eleventh Amendment herein in light of the Fourteenth Amendment and several federal statutes. They are without merit within the framework of the settled precedents of this Court.

The Eleventh Amendment clearly applies to federal question claims against the states in federal courts. This Court has so held from *Hans v Louisiana*, *supra*, to *Edelman v Jordan*, *supra*. See also *Whitner v Davis*, 410 F2d 24, 29 (CA 9, 1969); *Meyer v New Jersey*, 460 F2d 1252, 1253 (CA 3, 1972).

Further, the Eleventh Amendment immunity of the states is applicable in cases brought against the states under the Fourteenth Amendment. For example, in *Ford Motor Co v Department of Treasury of Indiana*, *supra*, 323 US, at 460-461, the plaintiff alleged, *inter alia*, a violation of the Fourteenth Amendment and yet this Court applied the doctrine of Eleventh Amendment immunity. More recently, in *Edelman v Jordan*, *supra*, 415 US, at 670-671, this Court overruled its decision in *Shapiro v Thompson*, 394 US 618 (1969) to the extent that such decision affirmed the lower court decree compelling, under the Fourteenth Amendment, the payment of retroactive welfare benefits from the State Treasury.

The law is settled that 42 USC 1983 was not intended to abrogate a state's Eleventh Amendment immunity. *Edelman v Jordan*, *supra*, 415 US, at 675-677. Neither a city, *Monroe v Pape*, 365 US 167 (1961), nor a state is a "person" within the meaning of 42 USC 1983. *Fitzpatrick v Bitzer*, *supra*, US ; 96 S Ct, at 2669. See also *Whitner v Davis*, *supra*, 410 F2d, at 29; and *Deane Hill Country Club, Inc v City of Knoxville*, 379 F2d 321, 324 (CA 6, 1967), *cert den*, 389 US 975 (1967).

The argument that 28 USC 1331 abrogates the Eleventh Amendment immunity of the states is erroneous. That statu-

tory provision is a jurisdictional statute which does not create any rights. *Lyle v Village of Golden Valley*, 310 F Supp 852, 855 (D Minn, 1970). It is an exercise of congressional power, pursuant to Article III of the Constitution and *Lockerty v Phillips*, 319 US 182, 187 (1942), to define the jurisdiction of the lower federal courts rather than an exercise of congressional authority to enforce § 5 of the Fourteenth Amendment.

Indeed, as early as *Hans v Louisiana*, *supra*, 134 US, at pp 9 and 15, this Court applied the states' Eleventh Amendment immunity in a case brought under the statutory forerunner of 28 USC 1331 conferring federal question jurisdiction upon the federal courts. In addition, as recently as *Mt. Healthy City School District v Doyle*, 45 USLW 4079, 4081 (January 11, 1977), this Court was deciding cases under 28 USC 1331 without any intimation that such statute, itself, abrogated the Eleventh Amendment immunity of the states.

In summary, the consistent holdings of this Court from at least 1890 to the present compel the conclusion that Eleventh Amendment immunity is applicable in federal question claims against the states, including claims under the Fourteenth Amendment, and that neither 42 USC 1983 nor 28 USC 1331 has abrogated such immunity. The respondents herein offer neither precedent nor logic to support their contrary contentions in this cause. This settled legal framework, with its regard for the role of the states in our federal system, should, we submit, be preserved. Any departure from this framework should emanate only from the conscious, express choice of Congress, in the enactment of enforcement legislation under § 5 of the Fourteenth Amendment, as illustrated in *Fitzpatrick v Bitzer*, *supra*. Here, as demonstrated above, there is no applicable congressional legislation pursuant to § 5 of the Fourteenth Amendment.

CONCLUSION

Education is not a right protected under the Constitution. *San Antonio Independent School District v Rodriguez, supra*, 411 US, at 35. Rather, it is a function reserved to state and local governments. The nature and extent of the violation determines the scope of the remedy. There has been no adjudicated Fourteenth Amendment violation with regard to the educational programs in the Detroit school system. *Milliken v Bradley, supra*, 418 US, at 744, 746 and 753. Thus, the lower courts, declining to follow the teachings of *Milliken v Bradley, supra*, employed a clearly erroneous legal standard to compel the system wide expansion of existing educational programs in the areas of in-service training, testing, guidance and counseling and reading in the Detroit school system.

The Detroit Board needs no federal court order to expand its existing educational programs. The judicial decree is needed only to secure additional, unappropriated funds from the State Treasury.

Under the decisions of the courts below, the Detroit Board has obtained a blank check to be filled in annually by the trial court and drawn upon the State Treasury for the operation of its school system. (PA 180a) This result, we submit, is contrary to the Eleventh Amendment as interpreted by this Court in *Edelman v Jordan, supra*, since the money judgment in question directly compels the payment of unappropriated funds from the State Treasury as a form of compensation for the alleged prior misconduct of petitioners.

In compelling the payment of unappropriated funds from the State Treasury, the lower courts have cast aside Michigan's constitutional and statutory provisions reposing the power to appropriate state funds in the Michigan legislature without any ruling that such provisions violate plaintiffs' rights. See pp 27-28 of petitioners' main brief. There has been no finding that any of the petitioners, by their own conduct, committed any act of discrimination with regard to the scope and content of educational programs in the Detroit school system. Moreover, such school system is administered by the Detroit Board, elected by the electors of the district. *Milliken v Bradley, supra*, 418 US, at p 742, n 20. Thus, the relief decreed below against petitioners is contrary to the sound principles of federalism enunciated by this Court in *Rizzo v Goode*, 423 US 362, 377, 380 (1976).

The states, including Michigan, and their political subdivisions traditionally provide a host of governmental services to their citizens including a system of criminal justice and corrections, social welfare services, mental health services and public education.^[4] The Tenth Amendment limits the power

[4]

Since the original brief of petitioners was filed herein, the revenue estimates for Michigan's general fund budget for fiscal 1976-1977, ending September 30, 1977, have shown an improvement as a result of amendments to tax legislation and an upturn in Michigan's economy which have generated additional tax revenues. Further, at the Governor's direction, his staff has written to the Detroit school system to inquire whether it is willing, jointly with members of the Governor's staff, to review the fiscal situation of the Detroit school system.

of Congress to force its choices upon the states as to the conduct of integral governmental functions. *National League of Cities v Usery*, US; 96 S Ct 2465, 2475-2476 (1976). So here, the Tenth Amendment limits the power of the federal courts to impose their choices upon the states as to the allocation of finite state tax revenues among those competing services financed with legislatively appropriated state funds.

The interests involved here include the continued legal, political and fiscal integrity of the states in our federal system of government under the Constitution. The fiscal policies of state governments as to taxation and appropriation of funds should continue to be determined by the elected representatives of the people through the democratic political process under state constitutions and state statutes. This traditional system of state government operation should not be discarded for a judicial remedy which corrects no adjudicated violation.

Previously, this Court rejected respondents' attempt to stretch a pupil assignment violation in a single school district into a massive multi-school district pupil reassignment remedy embracing 54 school districts and affecting 779,000 pupils in a three county area. *Milliken v Bradley, supra*, 418 US, at 729, 733 n 14, 752. This Court defined the constitutional right of plaintiffs "to attend a unitary school system" and remanded the case for "formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools." *Milliken v Bradley, supra*, 418 US, at 746, 753. Presently, respondents are attempting to strain a pupil assignment violation into a judicially imposed remedy compelling the system wide expansion of existing educational programs financed with unappropriated state funds. Thus, once again, this Court should reverse the opinion and judgment of the Sixth Circuit Court of Appeals, to the extent such opinion and judgment compel Milliken, et al, to pay additional, unappropriated funds from the State Treasury to the Detroit Board to pay for the cost

of court ordered educational program expansion in the Detroit school system.

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Dated: March 10, 1977

Supreme Court, U. S.
FILED

MAR 11 1977

MICHAEL ROBAX, JR., CLERK

No. 76-447

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM G. MILLIKEN, ET AL., PETITIONERS

v.

RONALD G. BRADLEY, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, ET AL., PETITIONERS

v.

RONALD G. BRADLEY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a court may order educational changes to be made as part of the remedy for racial discrimination in the operation of the schools.
2. Whether the relief granted against the State violated the Tenth or Eleventh Amendment.

INTEREST OF THE UNITED STATES

The United States has participated in several courts during the lengthy history of this case. The United

States intervened in this case in the court of appeals¹ and participated as *amicus curiae* in this Court when the case was last here. See *Milliken v. Bradley*, 418 U.S. 717 (*Milliken I*).

The United States has substantial responsibility under Titles IV, VI and IX of the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 88 Stat. 514 *et seq.*, 20 U.S.C. (Supp. V) 1701 *et seq.*, with respect to school desegregation. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States also contributes financially to school systems in the process of desegregation, and federal payments include support for educational programs as components of the desegregation process. See the Emergency School Aid Act, 86 Stat. 354, 357, 359, as amended, 20 U.S.C. (Supp. V) 1605(b) and 1606(a). The expenditures under this Act might be affected by the Court's disposition of this case.

For these and other reasons, the United States has participated, either as a party or as *amicus curiae*, in most of this Court's school desegregation cases, including *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294; *Cooper v. Aaron*, 358 U.S. 1; *Goss v.*

¹ This intervention was authorized by 28 U.S.C. 2403 because the constitutionality of an Act of Congress had been drawn into question. The court of appeals found it unnecessary to pass upon the constitutionality of the statute that had precipitated the intervention (see 484 F. 2d 215, 258 (*en banc*)), and the United States subsequently was dismissed as a party to this case.

Board of Education, 373 U.S. 683; *Green v. County School Board*, 391 U.S. 430; *Alexander v. Holmes County Board of Education*, 396 U.S. 19; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Wright v. Council of City of Emporia*, 407 U.S. 451; *School Board of City of Richmond v. State Board of Education*, 412 U.S. 92; *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189; *Norwood v. Harrison*, 413 U.S. 455; *Runyon v. McCrary*, 427 U.S. 160; *Pasadena City Board of Education v. Spangler*, No. 75-164, decided June 28, 1976; and *Vorchheimer v. School District of Philadelphia*, No. 76-37, argued February 22, 1977.

STATEMENT

A. PROCEEDINGS THROUGH THIS COURT'S DECISION IN MILLIKEN I

This suit was brought in 1970 as a class action against city and state officials by parents and their children attending Detroit public schools. Plaintiffs alleged that defendants had pursued a policy and practice of racial discrimination in the Detroit public schools.

In September 1971, after several preliminary proceedings (see 433 F. 2d 897, 438 F. 2d 945), the district court found that the Detroit school board had engaged in official acts of racial discrimination that had contributed to racial separation in the school system.²

² The board had used optional attendance zones, transported children on a racially-discriminatory basis, gerrymandered attendance zones and altered grade structures, and pursued discriminatory school construction policies. 338 F. Supp. 582.

The court also found that official acts of state agencies had contributed to racial separation in the Detroit schools. The court concluded that the State of Michigan, through passage of Act 48 in 1970, had overruled Detroit's voluntary desegregation plan and thus had contributed to the problem. Cf. *Reitman v. Mulkey*, 387 U.S. 369. In addition, the State supervised school site selection, approved Detroit's discriminatory construction program, and denied Detroit state funds for pupil transportation that were made generally available in other parts of the State. See 338 F. Supp. 582, 589, 592, 593-594.

After considering various remedial plans submitted by plaintiffs and the Detroit Board,³ the district court ordered the preparation of a student assignment plan that would encompass Detroit and 53 suburban school districts. See 345 F. Supp. 914. The court of appeals affirmed the findings of constitutional violations committed by both the Detroit school board and the State. See 484 F. 2d 215, 221-242. The court went on to hold that the remedy must include provisions for assigning students to schools outside the school districts in which they resided, because only such assignments could produce the racial mix the court thought to be desirable. *Id.* at 250-258.

This Court reversed in part in *Milliken I*. It did not disturb the findings that the State took part in the discrimination leading to the current conditions

³ The court of appeals had refused to upset the order requiring the submission of plans. See 468 F. 2d 902.

in Detroit. 418 U.S. at 748. The Court held, however, that since the record contained no significant evidence of violations having an interdistrict effect, the interdistrict relief was not commensurate with the scope of the violations. The Court remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." 418 U.S. at 753.

B. PROCEEDINGS ON REMAND

On remand, the district court ordered plaintiffs and the Detroit Board to submit remedial plans involving only the City of Detroit. The State defendants were ordered to submit a critique of the Detroit Board's plan (Pet. App. 13a). Hearings were held on the submitted plans, and the district court approved the Detroit Board's plan with some modifications (402 F. Supp. 1096; Pet. App. 7a-149a). It selected the Board's plan over that of plaintiffs because the Board's plan was more flexible and did not involve extensive transportation of minority students from one predominantly black school to another (Pet. App. 30a, 45a-49a, 62a). The court set out guidelines for the revision of the Board's plan to make greater use of student reassignments accomplished by rezoning and grade restructuring (Pet. App. 62a-72a).

Although plaintiffs' plan related solely to student assignment, the Detroit Board's plan included a num-

ber of "educational components." The educational components suggested were (Pet. App. 35a):

- a. In-Service Training [of teachers]
- b. Guidance and Counseling
- c. School-Community Relations
- d. Parental Involvement
- e. Student Rights and Responsibilities
- f. Testing
- g. Accountability
- h. Curriculum Design
- i. Bilingual Education
- j. Multi-Ethnic Curriculum
- k. Co-curricular Activities.

The district court found that the proposed plan did not distinguish "between those components that are necessary to the successful implementation of a desegregation plan and those that are not" (Pet. App. 35a). It stated that, although the "Board's plan * * * includes a number of educational components intended to facilitate desegregation[,] [s]ome are unrelated to desegregation and have been inserted with the hope that they could be implemented by court order" (Pet. App. 55a).

The district court included the "educational components" in the final plan only to the extent that it found them necessary to carry out desegregation. The court concluded that "the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation" and should be mandated "where they are needed to remedy effects of past segregation, to assure a suc-

cessful desegregative effort and to minimize the possibility of resegregation" (Pet. App. 36a).

Expert witnesses for the Detroit Board, plaintiffs and the State had given testimony to show the need for various educational programs to bring about desegregation. Dr. Edward Simpkins, Dean of the Wayne State University College of Education, testified that educational components should be included in the desegregation plan (A. 30-31):

I believe they should be included in the desegregation plan because the effort to desegregate has to have that going for it. The situations that were tolerable seem to become intolerable once integration becomes a part of the educational process. * * * People who don't have a program in ethnic studies are going to want to have a program in ethnic programs and studies, once they find out they have to mix with ethnic groups. * * * The fact that a counseling program, maybe there is a counseling ratio of 300—or one to 300 within a school or one to 350 which is educationally unsound, we know that. It becomes educationally intolerable generally once integration is made part of the total school program so you address yourself to, you certainly should address yourself to those educational issues that are sound and advantageous anyway whenever you take the desegregation step of the proportions that we are considering in this city * * *, there is going to be a need to address a number of educational issues that should have been addressed long before.

Dr. Simpkins also discussed the role of testing in the desegregation process (A. 31):

In a number of school systems and certainly in the City of Detroit at one time or another we have had tracking systems built into the school systems and testing has been used as a device for segregating and isolating racial groups within schools. We know this has occurred. * * * In addressing the testing question and the review question it seems to me that the Board has attempted to insure that even if the youngster finds himself in a classroom setting that an immediate test result might indicate he belongs in, there is going to be an opportunity for review so that he is not going to be assigned to that seat, that classroom setting on any permanent basis.

Margaret Ashworth, another expert witness called by the Detroit Board, testified that in-service training of teachers was necessary because (A. 33):

[w]hen we bring black and white children together in a classroom certain kinds of problems surface that are unlike those that existed before. Teachers have to have specific training in terms of how they will relate to those differences. In the event that black children have for the first time a white teacher, or vice versa, certain kinds of problems exist. In the first place there will be tensions, there will be hostilities, there will be resistance to the change, something that we have had experiences with and research to back up and that has to do with how one relates to differences. * * *

With respect to counseling and testing, Ashworth testified (A. 34-37):

I am very much convinced that the present counseling and guidance program would be inadequate * * *. I am referring to counselors who have not understood the cultural differences, the racial differences, the life styles of students unlike themselves. * * * [W]hat I am saying is that students have been counseled in or out of certain programs based on their race.

* * * * *

We believe and it is supported by a section in the plaintiff's critique that testing is very important in the desegregation effort in that adequately trained teachers and the administration of tests play a very important part in whether or not youngsters are admitted in certain curriculums, whether or not they are tracked and particularly as it relates to placement in special education type settings.

* * * * *

Are you telling this Court that testing has been segregatory?

A. Yes, I am. * * *

Q. Would it be fair to say that the testing component in the Board's plan is designed to prevent this type of segregatory effect?

A. Yes it would. * * * I believe it to be an essential part and a necessary part to make desegregation work and to correct the inequities that have come about as a result of testing practices in the Detroit Public Schools.

Dr. Michael Stolee, one of plaintiffs' experts, testified that counseling could be helpful in encouraging use by all students of programs traditionally utilized by only one race (A. 55). Dr. Gordon Foster, Director of the Miami Title IV Desegregation Center, was asked whether reading programs have been shown to be important in eliminating the lingering effects of racial discrimination. He answered (A. 56):

Very definitely so. * * * [B]oth in our work at the center and in the funds that are requested through the Emergency School Assistance Act for the Federal Government for desegregation, the Florida District perceives this to be perhaps their highest priority item.

Finally, one of petitioners' experts, Dr. Charles Kearney of the Michigan Department of Education, testified that an in-service training program for professional staffs would prepare the staffs for desegregation. He noted that while in-service training already existed, additional training was needed to create (A. 87):

an awareness * * * about the cultural diversity of this country, of this city * * * [T]he teacher, the professional ought to have an appreciation for those heritages and ought to be able to capitalize on kinds of differences, rather than look upon them as negative kinds of factors in dealing with children.

Dr. Kearney also testified that counseling, non-discriminatory testing, and curriculum changes are necessary to extirpate the effects of discrimination (A. 90-96).

The district court concluded (Pet. App. 36a-37a):

In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing, discriminatory counseling and discriminatory application of student discipline. In a system undergoing desegregation, teachers will require orientation and training for desegregation. Parents need to be more closely involved with the school system and properly structured programs must be devised for improving the relationship between the school and the community. We agree with the State Defendants that the following components deserve special emphasis: (1) In-Service Training; (2) Guidance and Counselling; (3) Student Rights and Responsibilities * * * ; (4) School-Community Relations-Liaison; (5) Parental Involvement; (6) Curriculum Design; (7) Multi-Ethnic Curriculum; and (8) Co-Curricular Activities. Additionally, we find that a testing program, vocational education and comprehensive reading programs are essential. We find that a comprehensive reading instruction program together with appropriate remedial reading classes are essential to a successful desegregative effort.

The district court emphasized the importance of an effective reading program (Pet. App. 72a) and discussed the importance of the other educational programs to the elimination of the effects of discrimination (*id.* at 73a-83a). See also *id.* at 127a-135a. The court ordered the city and state defendants to institute comprehensive programs for reading and communication skills, in-service training, testing, and

counselling and career guidance (*id.* at 146a). Thus, of the 11 educational components originally proposed by the Detroit Board, only three were incorporated into the court's final order, and a fourth (reading and communication skills training) was added by the court itself.

The court concluded that the cost of these four programs should be borne by both the city and State. The court ordered the Detroit Board to disclose its highest budget allocation in any year for each of the enumerated education programs already in existence. The court ordered the city defendants to provide that much money to pay for the educational components. The excess cost is to be paid equally by the Detroit Board and the state defendants (Pet. App. 146a-147a).⁴

⁴ The highest annual budget allocated for each of the four components (in effect in the 1975-1976 school year) was \$75,989,000. The excess cost of complying with the district court's order was computed by the Detroit Board to be \$11,645,000. Thus, under the district court's order, the state and city defendants each must contribute approximately 5.8 million dollars annually for expansion of educational programs (Pet. Br. 12-13).

The district court also found (Pet. App. 39a) that the State of Michigan does not supply the Detroit school district with as much money as it could be providing under a statute designed to aid districts that are unable to raise sufficient tax revenues (Mich. Stat. Ann. § 15.1919(525) (1975 rev.)). If the district were fully funded, it would receive an additional \$61,682,000; at the time of the district court's order, only 28 percent of the tax overburden section of the Act was funded by the state legislature. The court found that Detroit taxpayers have the highest municipal overburden in the state (Pet. App. 38a). It did not state whether other districts were also underfunded.

The court of appeals reversed the district court's order insofar as it adopted a student assignment plan that excluded three inner-city regions. The court affirmed the orders in all other respects (540 F. 2d 229; Pet. App. 151a-190a).

Petitioners had argued that there was no finding of constitutional violation that justified the inclusion of educational components in the plan. The court of appeals held, however, that the district court's finding that the educational components are necessary to "remedy effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation" * * * is not clearly erroneous, but to the contrary is supported by ample evidence" (Pet. App. 170a). The court of appeals summarized the evidence as follows (*id.* at 170a-171a):

The need for in-service training of the educational staff and development of nondiscriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation.

* * * * *

Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

The court of appeals therefore held that the district court acted within its powers (Pet. App. 171a) and that the remedy was related to the violation (*id.* at 179a):

Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful *de jure* segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no diminution in the quality of education.

The court of appeals also held that the district court properly required the State to bear part of the costs of the educational components because the order (Pet. App. 178a) "imposes no money judgment on the State of Michigan for past *de jure* segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of of *de jure* segregation."

SUMMARY OF ARGUMENT

I

The remedy in a school desegregation case "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (*Milliken I*). The goal of the remedy in a case like the present one is to eliminate the racial discrimination and all of its lingering effects. Petitioners, how-

ever, have confused the goal of the remedy with the tools available to a district court to reach that goal. The courts are not limited to undoing step-by-step the particular acts of discrimination perpetrated by the defendants.

The evidence showed that discrimination in the operation of the schools often has pervasive effects on the educational process. The district court was required to formulate a plan that would overcome these effects, and at the same time not disrupt the education of the students. The court also was required to adopt a plan addressing any new problems that would result from the process of desegregation itself. In other words, it was required to adopt a plan that would work. *Green v. County School Board*, 391 U.S. 430. The record in this case supports the district court's conclusion that educational programs were needed in order to make the desegregation plan work.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15. The district court therefore has the authority to require educational programs, where such programs are necessary to eradicate the lingering effects of racial discrimination and to bring about effective desegregation.

The educational components of the district court's plan in this case serve that goal. The in-service

teacher training program is designed to help faculty understand and overcome the problems of teaching in newly integrated schools and to capitalize on the diversity of the student body; the testing program is designed to detect and eradicate misleading information about individual students' capabilities that may have been generated by racial discrimination; the counseling and reading programs will help overcome educational deficiencies that can be traced, at least in part, to racial discrimination. It was, therefore, proper for the district court to require Detroit officials to comply with the educational components of the plan.

II

Petitioners' argument that the district court lacks the authority to require them to pay part of the cost of the plan is insubstantial. Both courts below found that petitioners took part in the racial discrimination in the operation of the Detroit schools, and petitioners do not challenge that finding here. That being so, the district court was authorized to provide prospective equitable relief, even though such relief may require the expenditure of money. *Edelman v. Jordan*, 415 U.S. 651, 664-668.

The order to pay for the equitable relief does not infringe state sovereignty. The purpose of the Fourteenth Amendment was to prevent States and their subdivisions from engaging in invidious discrimination, and it is not an invasion of their "sovereignty" to compel them to make amends for viola-

tions of that Amendment. "[N]o state law is above the Constitution" (*Milliken I, Supra*, 418 U.S. at 744), and no decision of this Court has held that judicial remedies for violations of the Constitution must yield to principles of state sovereignty. See *Fitzpatrick v. Bitzer*, 427 U.S. 445; *Ex parte Virginia*, 100 U.S. 339.

ARGUMENT

I

A COURT MAY ORDER EDUCATIONAL CHANGES TO BE MADE AS PART OF THE REMEDY FOR RACIAL DISCRIMINATION IN THE OPERATION OF THE SCHOOLS

A. THE REMEDY FOR RACIAL DISCRIMINATION SHOULD ELIMINATE ALL OF THE EFFECTS OF THE CONSTITUTIONAL VIOLATION

Whether the district court abused its discretion in ordering the Detroit Board to adopt (and petitioners to pay part of the cost of) certain educational programs in this case depends in large measure upon the goal the remedial order in such cases should be designed to achieve. The Court has articulated the goal in *Milliken I, supra*, 418 U.S. at 746: "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."

The goal, in other words, is to eliminate "root and branch" the violations and all of their lingering effects. *Green v. County School Board*, 391 U.S. 430, 438. It is to eliminate those effects whatever they may

be and wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 203. The goal is not merely to adopt a plan to rearrange student assignments; it is, rather, to adopt a plan that promises "realistically to work" in overcoming the effects of discrimination. *Green, supra*, 391 U.S. at 439.

"In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown v. Board of Education*, 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."

Racial discrimination in the operation of the schools often has a pervasive effect on the educational process and on the hearts and minds of the students. See *Brown v. Board of Education*, 347 U.S. 483, 494.⁵ The remedial decree should seek to alleviate these intangible effects, no less than to alleviate the assignment of students to racially identifiable schools. To this end there must be broad equitable power "to remedy past wrongs" (*Swann, supra*, 402 U.S. at 15).

⁵ See also *Gilmore v. City of Montgomery*, 417 U.S. 556, 571; *Norwood v. Harrison*, 413 U.S. 455, 469.

We agree with petitioners that a court is not at liberty to produce a result merely because it may find the result desirable. The existence of a violation of the Constitution does not authorize a court to bring about conditions that never would have existed in the absence of official racial discrimination. The remedy should not be designed to eliminate arguably undesirable states of affairs that are caused by private conduct ("de facto segregation") or state-caused conditions not related to racial discrimination. This much has been settled by *Milliken I*. See also *Spencer v. Kugler*, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.);⁶ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, No. 75-616, decided January 11, 1977, slip op. 12-13 and n. 15, 17-18 and n. 21.

The task of a remedial decree in a school desegregation case "is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy." *Swann, supra*, 402 U.S. at 16. Congress has made a similar judgment. In the Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712, Congress provided that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court * * * shall seek or impose

⁶ In *Spencer* the Court summarily affirmed a district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines.

only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

Petitioners, however, have confused the *goal* of the remedy with the *tools* available to a district court to reach that goal. They seem to contend that because the defendants did not use the lack of in-service training, for example, as part of a plan of discrimination, in-service training cannot be part of the plan to eliminate the lingering effects of the proved discrimination. This approach would unduly constrict the flexibility of a court charged with creating a decree that will eliminate *all* of the effects of the racial discrimination.⁷ Congress has provided (20 U.S.C. (Supp. V) 1703(b)) that no State may deny equal educational opportunity by failing "to take affirmative steps * * * to remove the vestiges" of discrimination. Petitioners would deny district courts the tools needed to achieve that goal.

A district court has great flexibility in crafting an equitable remedy to meet the problems presented by particular cases. It cannot be confined to ordering the defendants to undo the discrimination itself, because that often would leave the effects of the discrimination untouched. In *Green*, for example, although the unconstitutional racial discrimination was the assignment of students to one school or another on the basis of race, it was not a sufficient remedy to

⁷ In a desegregation case the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154.

order the defendants to implement a "freedom of choice" plan, under which no student would be assigned on the basis of race to any school. The freedom of choice plan did nothing to overcome the lingering racial identifiability of the schools.

The principle is the same when the lingering effects of racial discrimination include deficient education received by black students in racially identifiable schools (with resulting disparities in achievement levels among students to be integrated) and the attitudes that teachers may have acquired during the many years racial discrimination was practiced by the school officials. To say that the district court is powerless to address these consequences of racial discrimination would be to say that some of the most damaging consequences of discrimination will go unattended. The mere mixture of racial groups does not constitute effective desegregation—and, indeed, may not result in a workable plan for desegregated education—if students and teachers are not given the tools necessary to overcome problems that arise in the process of desegregation.

"[W]ords are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern" (*Swann, supra*, 402 U.S. at 31). In *Swann* itself the district court's order included a requirement of in-service training of teachers and the creation of a bi-racial advisory committee to help the school system begin the process of desegregation. 318 F. Supp. 786, 802.⁸ As we now show, such

⁸ Petitioners err in asserting (Br. 20-21) that the Charlotte-Mecklenburg decree was limited to student assignments.

provisions in remedial decrees may be integral parts of the process of eradicating the lingering effects of discrimination. Whether or not they are properly used in particular cases rests primarily within the sound discretion of the district court; no *per se* rule forbids (or requires) their use.

B. ALTERATIONS IN THE EDUCATIONAL PROGRAM OF A SCHOOL SYSTEM UNDERGOING DESEGREGATION MAY BE NECESSARY TO ERADICATE THE LINGERING EFFECTS OF RACIAL DISCRIMINATION

The assignment of students to schools on the basis of race, the construction of schools so that they usually are or quickly become racially identifiable, and the other instruments of racial discrimination that may be found in metropolitan school systems have effects that extend far beyond the placement of students in particular schools. A remedial plan that does no more than reassign students will not eliminate whatever psychological and educational effects may have been caused by the discrimination. A simple reassignment of students might prevent psychological effects and educational deficiencies from arising in the future, but it would do nothing about the burdens imposed on the students who have suffered from racial discrimination in the past.

Nor does the mere reassignment of students provide relief that may be required for problems that result from the desegregation process itself. In at least some cases, the inclusion in a remedial plan of "educational components" similar to those at issue here will provide relief to those who have been victims of

discrimination before they leave the school system. It may, in other words, provide relief for the particular harms done to particular students, whereas the student reassignment provisions of the plan are designed to provide relief to the school system as a whole and prevent the violations from recurring.

In the event of a constitutional violation "all reasonable methods [must] be available to formulate an effective remedy." *North Carolina Board of Education v. Swann*, 402 U.S. 43, 46. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann, supra*, 402 U.S. at 15. No principle of equity limits the remedy to undoing, step by step, all of the acts making up the racial discrimination. Instead, courts have and must have the discretion to choose among many tools designed to bring about the elimination of the effects of the violation. Cf. *Hills v. Gautreaux*, 425 U.S. 284, 296-297.

Congress has determined that special educational programs often are necessary as part of a plan of desegregation, in order to eliminate the effects of racial discrimination and to address the new problems arising in the desegregation process. Title IV of the Civil Rights Act of 1964, 78 Stat. 248, as amended, 42 U.S.C. 2000c *et seq.*, authorizes the Commissioner of Education to provide information about "effective methods of coping with special educational problems occasioned by desegregation" (42 U.S.C. 2000c-2), to

provide grants for training programs "designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation" (42 U.S.C. 2000c-3), and to make grants to pay all or part of the cost of in-service training of teachers and other school personnel to deal with problems incident to desegregation (42 U.S.C. 2000c-4).

In the Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. (Supp. V) 1601 *et seq.*, Congress authorized federal financial assistance

to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools; [and] * * * to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. (Supp. V) 1601. The Act provides federal financial assistance for special remedial programs, employment of staff members trained in solving the problems incident to desegregation, the retraining of existing staff, in-service teacher education to help overcome racial stereotypes and other impediments to desegregation, comprehensive guidance and counseling for students, development of new curricula and institutional methods to instruct students of all ethnic and economic backgrounds, career education, innovative interracial programs, community activities in support of the remedial plan, administrative serv-

ices to facilitate the success of the plan, planning, and remodeling of facilities. 20 U.S.C. (Supp. V) 1606(a). The Act also provides funds for "unusually promising pilot programs or projects designed to overcome the adverse effects of minority group isolation by improving the academic achievement of children in one or more minority group isolated schools * * *." 20 U.S.C. (Supp. V) 1605(b).

The courts of appeals, which have extensive experience with the problems of overcoming the continuing effects of racial discrimination, often have used or approved educational changes similar to those required by the courts below in the instant case.* The Fifth Circuit, which deals most often with school cases, has recognized that educational changes are integral parts of effective remedial plans. That court therefore has instructed district courts to require school officials to "provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education." *United States v. Jefferson County Board of Education*, 380 F. 2d

* See also Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly Integrated Student Bodies*, 39 L. & Contemp. Prob. 314 (1975). Professor Orfield argues that teaching methods, curricula, and traditional means of grouping students should be reassessed to facilitate the process of desegregation. The author also observes that one study has shown that when curriculum changes accompanied student reassignments, many children returned to the public schools from private schools. *Id.* at 338.

385, 394 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840.

The guidelines established in *Jefferson County Board of Education* were designed to apply to all school cases within the Fifth Circuit.¹⁰ Thus, in *Plaquemines Parish School Board v. United States*, 415 F. 2d 817, that court approved a plan requiring the school board to establish remedial educational programs for black students who, under the student assignment plan, would be attending formerly all-white schools. The court stated (415 F. 2d at 831):

The remedial programs, ordered by the district court, are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion.

The Fifth Circuit does not stand alone in using such techniques. In *United States v. Missouri*, 523 F. 2d 885, 887 (C.A. 8), the court required the defendants to establish in-service training programs for faculty and staff. In *Morgan v. Kerrigan*, 530 F. 2d 401 (C.A. 1), certiorari denied *sub nom. White v. Morgan*, 426 U.S.

¹⁰ In *United States v. Wilcox County Board of Education*, 494 F. 2d 575 (C.A. 5), certiorari denied, 419 U.S. 1031, the court of appeals held that it was error *not* to create a countywide advisory and liaison committee. See also *Tasby v. Estes*, 517 F. 2d 92 (C.A. 5) (appointment of tri-ethnic committee to advise the school district).

935, the court ordered several schools to be converted to "magnet" schools and educational changes to be made in other schools; the court also appointed a committee of universities to oversee the development.¹¹ In *Hart v. Community School Board of Brooklyn*, 383 F. Supp. 699 (E.D.N.Y.), affirmed, 512 F. 2d 37 (C.A. 2), the court ordered the creation of a "magnet school" and the implementation of educational improvements.¹²

The multiplicity of methods devised by these courts demonstrates that, in fashioning remedial tools to be used against racial discrimination, the district courts are not confined to eliminating the devices that once were used as tools of discrimination.

¹¹ Cf. *Morgan v. McDonough*, 540 F. 2d 527 (C.A. 1), certiorari denied, January 10, 1977 (No. 76-664) (placing one high school in receivership and ordering educational changes to avoid frustrating desegregation); *Morgan v. McDonough*, C.A. 1, No. 76-1121, decided January 26, 1977 (approving certain orders concerning the receivership).

¹² Petitioners incorrectly rely (Br. 21-22) on *Keyes v. School District No. 1, Denver, Colorado*, 521 F. 2d 465, 480-483 (C.A. 10), certiorari denied, 423 U.S. 1066, for the proposition that educational components never may be included in a desegregation plan. The Tenth Circuit held that a district court overstepped its authority by requiring a "pervasive and detailed" (521 F. 2d at 482) plan for bilingual and bicultural education of minority children. The court disapproved the plan because it was not designed to eradicate the continuing effects of the racial discrimination and because it was an excessive intrusion into the prerogatives of local education authorities. The court did not hold, however, that no educational components could be ordered under any circumstances.

C. THE DISTRICT COURT'S PLAN IS REASONABLE

If, as we contend, and as the courts below held, a remedial plan properly may require some adjustments in the school system's educational programs, the remaining question is whether the district court abused its discretion by ordering the Detroit Board to implement the four "educational components" in this case. Both the district court and the court of appeals found that the "educational components" in the plan were necessary to ameliorate the lingering effects of official racial discrimination in the operation of the schools. This is therefore an appropriate occasion to invoke the "seasoned and wise rule of this Court [that] concurrent findings of two courts below [are] final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214. See also *Milliken I*, *supra*, 418 U.S. at 738 n. 18. Petitioners have not argued that the district court abused its discretion; they have argued, instead, that it has no discretion in this regard. If the Court rejects petitioners' argument that the district court is powerless to order any "educational component," that should be the end of this case.

In any event, the evidence we have recounted at pages 6-14, *supra*, supports the district court's holding that the educational components are necessary to bring to an end the continuing effects of racial discrimination in the operation of the schools and to deal with the problems resulting from desegregation. The in-service teacher training program is designed to

help faculty understand and overcome the problems of transition to a nondiscriminatory school system and to capitalize on the diversity of their students; the testing program is designed to detect and eradicate misleading information about individual students' capabilities that may have been generated by racial discrimination; the counseling program is designed to provide career and educational guidance for students whose opportunities may have been impaired by acts of racial discrimination and to inform all students of the new opportunities available to them; the reading program is designed to compensate for the educational deficiencies in the Detroit schools that may be traced, at least in part, to racial discrimination.¹³

There might be cause for concern if the district court had promulgated a plan that stripped the school board of the discretion to devise and carry out an educa-

¹³ Both the district court (Pet. App. 9a, 36a, 58a, 78a, 104a, 107a) and the court of appeals (*id.* at 170a) also concluded that the educational components were justified as part of an attempt to prevent "resegregation." This apparent concern about probable stability in the anticipated racial composition of the student population is not impermissible. In choosing between otherwise permissible remedial plans, a district court does not abuse its discretion in selecting the one causing the least adverse private reaction, whether that reaction might take the form of "white flight" or, as in some cities, violent resistance. Moreover, to the extent that "resegregation" may include the reassertion, as a result of the lingering effects of past discrimination, of the racial identifiability of the schools attributable to that discrimination, it must be dealt with and overcome in any remedy designed to put the school system in the position it would have occupied but for the racial discrimination. For example, changes in the educational program of the schools may be necessary to induce white parents to send their children to schools that were formerly identifiably "black" and that may have

tional program, or if the district court unnecessarily had interfered with that authority. "School authorities are traditionally charged with broad power to formulate and implement educational policy" (*Swann, supra*, 402 U.S. at 16), and district courts ought not to assume that role in the absence of a default by local authorities—and then only to the extent necessary to rectify that default. That is all that has occurred here; the remedy at issue is specifically designed to alleviate the effects of racial discrimination in the operation of the schools.

Whenever possible, a federal court ought to avoid prescribing the details of educational policy, but the present case does not present the spectre of a district court's running the educational program of an entire school system. The "educational components" of the remedial plan here were proposed by the Detroit school board. The plan has received the full support of the Detroit officials, respondents in this Court. The district court's plan does not prescribe the day-

acquired a reputation, attributable to racial discrimination, as educationally inadequate.

Thus, there is no reason to believe that the courts below undertook to engage in the kind of exercise prohibited by *Pasadena City Board of Education v. Spangler*, No. 75-164, decided June 28, 1976. *Spangler* held that a district court may not reassign students annually to take account of demographic changes in student populations and shifts in racial composition of the schools not attributable to new acts of racial discrimination. Nor should the references below to resegregation be construed as requiring a particular degree of racial balance in each school or classroom. There is no indication that the courts below held, contrary to the law of the case (see *Milliken I, supra*, 418 U.S. at 740-741), that such racial balance must be achieved.

to-day details of administration of the educational components; rather, the plan states broad objectives, and the local school authorities are free to achieve them as they think best. We therefore submit that the district court did not abuse its discretion in ordering the implementation of the four educational components challenged by petitioners.

There remains the question whether the district court should have ordered petitioners to pay part of the cost of providing these educational components. The district court did so in light of the findings, not challenged here by petitioners, that petitioners took part in the racial discrimination. That, in our view, is a sufficient foundation for the order to pay half of the increased costs attributable to the implementation of the educational components.¹⁴ Cf. *Griffin v. County School Board*, 377 U.S. 218, 233 (a federal court may order a county to levy taxes to raise funds necessary to carry out desegregation).¹⁵

¹⁴ Petitioners' argument (Br. 14, 38) that the court of appeals has written a "blank check" on the state treasury is incorrect. If the costs of the educational components of the plan increase unexpectedly, petitioners could ask the district court for relief; if relief were denied, they could seek review by the court of appeals. Similarly, if the district court were to increase petitioners' proportionate contribution to the costs of the plan higher than 50 percent, petitioners could obtain appellate review. The court of appeals has approved only the plan before it.

¹⁵ Indeed, municipalities and school boards are subdivisions of the States. Although they are not equated with the States for all purposes (see *Mt. Healthy City School District Board of Education v. Doyle*, No. 75-1278, decided January 11, 1977, slip op. 5-6), they exist by leave of the State, and it cannot entirely disclaim responsibility for their deeds. See *Waller v. Florida*, 397 U.S. 387.

THE DIRECTION TO PETITIONERS TO PAY PART OF THE COSTS
OF THE REMEDIAL PLAN DOES NOT VIOLATE THE TENTH
OR ELEVENTH AMENDMENT

Petitioners argue that, even if the district court properly ordered the Detroit Board to implement the educational components of the remedial plan, it was powerless to order the state defendants to pay any part of the cost (Br. 23-38). Petitioners do not, however, contest the holding of both the district court (338 F. Supp. at 589, 592-594), and the court of appeals (484 F. 2d at 238-241), that they took part in and fostered the acts of racial discrimination within Detroit. See also *Milliken I*, *supra*, 418 U.S. at 734-735 n. 16, 748 (declining to disturb the findings of state participation). Petitioners therefore are arguing, in effect, that if relief for violations of the Fourteenth Amendment will require a State to spend money, federal courts may not order relief (see Br. 26-38). The law, however, is settled to the contrary.

1. Although the Eleventh Amendment ordinarily precludes a federal court from directing a State to pay a sum of money as an accrued liability (*Edelman v. Jordan*, 415 U.S. 651), it does not prevent a court from providing an equitable remedy for constitutional violations, even when that remedy will entail the expenditure of funds (*id.* at 664). In the present case, the expenditures required of petitioners all are incident to prospective compliance with injunctive relief, and their requirement, therefore, is not barred by the Eleventh Amendment (*id.* at 667-668).

The "direct" nature of the order to provide money does not change the result. In *Griffin v. County School Board*, 377 U.S. 218, 233, the Court stated that a county could be ordered to levy taxes to raise funds necessary to carry out desegregation. See also *Graham v. Richardson*, 403 U.S. 365, in which the Court upheld a prospective order to pay welfare benefits. *Edelman*, too, indicates that a prospective order to pay money does not offend the Eleventh Amendment.¹⁶

2. The Tenth Amendment, upon which petitioners rely (Br. 29-31), does not forbid enforcement of the Fourteenth Amendment. The major purpose of the Fourteenth Amendment is to prevent States from engaging in invidious discrimination. The Fourteenth

¹⁶ The Equal Educational Opportunities Act of 1974, 88 Stat. 515, 20 U.S.C. (Supp. V) 1703(b), provides that no State may deny equal educational opportunity by "the failure of an educational agency which has formerly practiced * * * deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." This statute was enacted in part pursuant to Congress' power under Section Five of the Fourteenth Amendment, and it applies to this case as a new law enacted during the pendency of the litigation. See *Bradley v. School Board of the City of Richmond*, 416 U.S. 696. Congress therefore has indicated that courts may require affirmative action to eliminate the continuing effects of racial discrimination in the operation of the schools, and the Eleventh Amendment does not forbid the award of monetary relief under a statute based upon Section Five of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445.

Neither the district court nor the court of appeals relied upon Section 1703(b), and it is not clear to what extent they believed that the educational components of the plan were necessary to comply with this statute. The existence of such a statute demonstrates, however, that the Eleventh Amendment erects no absolute bar against the type of relief awarded in this case. See *Fitzpatrick*, *supra*.

Amendment would be feeble indeed if, as petitioners contend, the Tenth Amendment erects a shield that prevents enforcement of the Fourteenth whenever curing the racial discrimination practiced by a State requires the expenditure of money. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445; *South Carolina v. Katzenbach*, 383 U.S. 301, 308; *Ex parte Virginia*, 100 U.S. 339.

This Court has concluded in *Fitzpatrick, Virginia*, and other cases that the Fourteenth Amendment is a restriction on state sovereignty to the extent necessary to carry out its goals. See also *Mitchum v. Foster*, 407 U.S. 225, 238-239. Petitioners apparently argue that *National League of Cities v. Usery*, 426 U.S. 833, supports a contrary position, but they are wrong. "[N]o state law is above the Constitution." *Milliken I, supra*, 418 U.S. at 744. *National League* held that Congress lacks the power under the Commerce Clause to interfere with the sovereign decisions of States with respect to compensation of their employees; the Court did not rely upon the Tenth Amendment for this holding, and it did not intimate that judicial remedies for violations of the Constitution would be required to yield to principles of state sovereignty. *Fitzpatrick*, decided four days later, demonstrates that the authority of Congress and the courts to rectify violations of the Fourteenth Amendment stands unimpaired.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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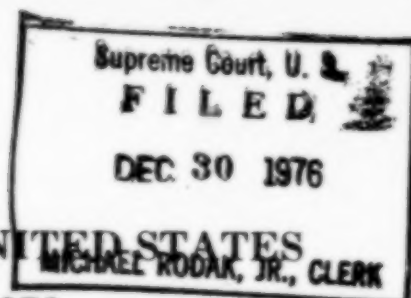
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MARCH 1977.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976



NO. 76-447

* * *

**WILLIAM G. MILLIKEN, Governor of the State of
Michigan, et al.,**

Petitioners,

V.

**RONALD BRADLEY and RICHARD BRADLEY,
by their Mother and Next Friend, VERDA
BRADLEY, et al.,**

Respondents.

* * *

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

* * *

**BRIEF OF AMICUS CURIAE,
THE STATE OF TEXAS**

* * *

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-447

WILLIAM G. MILLIKEN, Governor of the State of
Michigan; FRANK J. KELLEY, Attorney General of
the State of Michigan; MICHIGAN STATE BOARD
OF EDUCATION, a constitutional body corporate;
JOHN W. PORTER, Superintendent of Public
Instruction of the State of Michigan; and ALLISON
GREEN, Treasurer of the State of Michigan,

Petitioners,

V.

RONALD BRADLEY and RICHARD BRADLEY, by
their Mother and Next Friend, VERDA BRADLEY;
JEANNE GOINGS, by her Mother and Next Friend,
BLANCH GOINGS; BEVERLY LOVE, JIMMY
LOVE and DARRELL LOVE, by their Mother and
Next Friend, CLARISSA LOVE; CAMILLE
BURDEN, PIERRE BURDEN, AVA BURDEN,
MYRA BURDEN, MARC BURDEN and STEVEN
BURDEN, by their Father and Next Friend,
MARCUS BURDEN; KAREN WILLIAMS and
KRISTY WILLIAMS, by their Father and Next
Friend, C. WILLIAMS; RAY LITT and MRS.
WILBUR BLAKE, parents; all parents having
children attending the public schools of the City of
Detroit, Michigan, on their own behalf and on behalf
of their minor children, all on behalf of any person
similarly situated; and NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED
PEOPLE, DETROIT BRANCH; BOARD OF

EDUCATION OF THE CITY OF DETROIT, a
school district of the first class; DETROIT
FEDERATION OF TEACHERS, LOCAL 231,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Respondents.

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF
TEXAS

* * *

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, appears in its entirety in Petitioners' Appendix, filed herein (at pages 151a-190a in Appendix to Petition for Writ of Certiorari).

Other opinions and orders delivered in lower courts in this cause are fully and completely presented in Petitioners' Brief.

JURISDICTION

Jurisdiction in this Court is properly invoked by Petitioners pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Whether, absent a finding of a constitutional violation in the structure of the curriculum and educational programs in the Detroit school system, the lower courts

erred in ordering a restructuring of that curriculum and programming.

II.

Whether the lower courts erred in ordering defendants below in the executive branch of state government to provide \$5.8 million or more in additional, unappropriated state funds to defray the cost of the restructuring of curriculum and programming in the Detroit school system.

STATEMENT

The State of Texas files this brief as *amicus curiae* in support of Petitioners pursuant to Rule 42(4), Supreme Court Rules.

The comprehensive and detailed Statement of the Case presented by Petitioners, coupled with the recitation present in the Opinion of the United States Court of Appeals for the Sixth Circuit obviates the need for a restatement in this brief.

The State of Texas files this brief to discuss the two very important issues involved herein (as reflected in Questions Presented) and limits its involvement to those two areas. Texas is certainly mindful of the need for quality education and equal treatment under the law, and finds no fault with attempting to achieve those goals in Detroit or elsewhere. However, the dangerous prospect of unlimited discretion in the federal judiciary in these matters warrants the involvement of the State of Texas in light of its continuing efforts to protect its integrity and sovereignty.

DISCUSSION

I.

ABSENT A FINDING OF A CONSTITUTIONAL VIOLATION IN THE STRUCTURE OF THE CURRICULUM AND EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE LOWER COURTS ERRED IN ORDERING A RESTRUCTURING OF CURRICULUM AND PROGRAMMING.

The spectre of the federal judiciary reshaping the curriculum and programs of an educational system to satisfy the individual or personal values and judgments of a particular member or members of the judiciary, the pronouncements of the United States Court of Appeals for the Sixth Circuit notwithstanding, in the absence of any finding of a constitutional infirmity in that curriculum is both frightening and unacceptable. The very basic principle of granting relief only where constitutional or statutory violations are evident is in great jeopardy if such an unwarranted remedy is allowed.

This litigation involves the allegation that the schools in the City of Detroit have been segregated to a degree that is constitutionally impermissible. A decision has been made that the allegation was based in fact and that desegregation must occur. Extensive relief and remedial action was ordered to rectify this situation. Unfortunately, the relief was not limited to rectifying the problem at issue; and the broadbrush treatment given by the federal courts herein cannot be condoned anymore than expanding this litigation to involve other school systems outside the City of Detroit could be

condoned. *Milliken v. Bradley*, 418 U.S. 717 (1974).

Simply stated, this Court is faced with a situation where courts of the federal judiciary have clearly been unmindful of the well-established principle that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). Whether the relief ordered with respect to the additional components is good or bad or will even improve the educational system is immaterial in the absence of a finding of a constitutional violation in the existing programs; and a finding that a constitutional violation exists in the present system in that unlawful segregation has been shown does not justify the restructuring (and increased expenditures) ordered here.

This Court recently remanded *Austin Independent School District v. United States*, No. 76-200, to the United States Court of Appeals for the Fifth Circuit in light of *Washington v. Davis*, 426 U.S. 229 (1976). The lesson to be learned from *Washington* is even more applicable to the instant cause. Here, there has been no finding that the current curriculum and program structure is discriminatory in any way to any ethnic or minority group. There has been no finding that some are provided a particular curriculum or programs which are denied to others. As with "Test 21" discussed at length at *Washington*, all students have the same chances and exposure in the present school programming; and there is no reason to believe it is anything but impartial and adequate.

The United States Court of Appeals for the Sixth Circuit attempts, partially, to justify its ordering of the additional educational components with their related price tags and court ordered partial state financing by

stating:

"Without the reading and counseling components, black students *might* be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." See Sixth Circuit Opinion reprinted in full in Petitioners' Appendix to Petition for Writ of Certiorari, at page 171a. (Emphasis added.) *Bradley v. Milliken*, 540 F.2d 229 (6th Cir. 1976).

The United States Court of Appeals for the Sixth Circuit is clearly willing to take the unwarranted and impermissible step of ordering the expenditure of millions of dollars of local funds and millions of dollars of unappropriated state funds to alter a situation which it feels "might" cause some future deprivation in an intangible such as motivation. Furthermore, such relief is ordered without any finding of constitutional violation in the present structure. Such judicial individuality cannot be allowed to stand.

In summary, the courts below have lost sight of the issue at hand in this litigation. That issue is desegregation of schools and not the restructuring of programs. After desegregation has been accomplished and an appropriate pupil mix is evident, the court should stop. *Pasadena City Board of Education v. Spangler*, ___U.S.___, 96 S.Ct. 2697, 2704-2705 (1976). Additionally, at least one other Circuit Court has also dealt with this specific issue of restructuring of programs in addition to transferring pupils in a desegregation case where there was no finding of unconstitutionality of the existing program and correctly stated:

"The clear implication of arguments in support of the court's adoption of the Cardenas

Plan is that minority students are entitled under the Fourteenth Amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not." *Keyes v. School District No. 1, Denver, Colorado*, 521 F.2d 465, 482 (10th Cir. 1975), cert den. 423 U.S. 1066 (1976).

As in *Keyes*, the fact that the educational components might be advantageous or meritorious is simply not justification enough for their inclusion as relief absent a finding of constitutional deprivation caused by the existing curriculum.

II.

THE LOWER COURTS ERRED IN ORDERING DEFENDANTS BELOW IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PROVIDE \$5.8 MILLION OR MORE IN ADDITIONAL, UNAPPROPRIATED STATE FUNDS TO DEFRAY THE COST OF THE RESTRUCTURING OF CURRICULUM AND PROGRAMMING IN THE DETROIT SCHOOL SYSTEM.

It is of utmost importance that the sovereignty of the states comprising this union not be ignored. The Tenth Amendment to the United States Constitution, stating that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

must not be ignored. The federal judiciary is not, and was never intended to be, entirely dominant in its relations with the states.

"While it is imperative that the federal courts act diligently to protect those fundamental rights whenever it appears they are infringed by the action of a state, it is equally imperative that those same courts refrain in other instances from asserting jurisdiction to intervene in the internal processes of state government." *Olbro v. Petrilli*, 60 F.R.D. 189, 192 (1973).

The restraint correctly recognized in *Olbro* is most necessary here to insure the continued vitality of the state sovereignty called for in the Tenth Amendment.

Perhaps no more clear example of abuse visited upon state sovereignty could be found than in the instant litigation. Unappropriated state funds have been ordered to be used for funding of educational components either in ignorance or disregard of the constitutionally valid state scheme for appropriation of funds solely by the state legislature and the state scheme for school financing. Mich. Const. 1963, Art. 9, §§6, 11 and 17. The state scheme for allocation of state resources has in no way been found to be constitutionally defective; yet it has been circumvented to a point of being meaningless. No more essential function of a state could be imagined than control of its own fiscal matters (so long as there is no finding of unconstitutionality in the method used).

This issue of state sovereignty raises grave concern as to the whole issue of federalism which is essential to our union. As this Court has observed:

"where . . . the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' *Stefanelli v. Minard* . . ." *Rizzo v. Goode*, ___U.S.____, 96 S.Ct. 598 (1976).

See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 44 (1973). It is clearly a matter of whether the State of Michigan is to be allowed to control its own fiscal affairs, absent constitutional violation; and there is every indication from this Court that such sovereignty of state should and will be recognized. *National League of Cities v. Usery*, ___U.S.____, 96 S.Ct. 2465, 2475-2476 (1976).

In addition to the severe blow dealt to the sovereignty of the State of Michigan pursuant to the Tenth Amendment by the lower courts, grave concern must also be expressed at the treatment given protections afforded the states under the Eleventh Amendment to the United States Constitution. Here, the lower courts have shown no hesitancy to raid the public fisc, with little more than a cursory nod at the Eleventh Amendment, to the tune of millions of dollars. Such action taken by the lower courts apparently was accomplished with almost total disregard to this Court's past instructions that desegregation remedies must take into account the practicalities of the situation at issue. *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). It is obvious that when the practicalities indicated that the lower courts' additional education components could not be implemented out of revenues of the Detroit school system, the correct focus of refashioning the remedy was ignored in favor of an unauthorized raid on state revenues.

A mention of *Edelman v. Jordan*, 415 U.S. 651 (1974) is almost mandatory at this point. The applicability of *Edelman* to this cause is most apparent to *amicus*. The state defendants here were alleged to have participated in prior wrongdoing with regard to pupil assignment. Such wrongdoing, on the part of all defendants, was alleviated by the lower courts' extensive orders reassigning pupils. What, then, is the effect of an award of state funds for the implementation of educational components upon which no findings of constitutionality have been made? *Amicus* sees such an award as either one of two possible occurrences. Either the lower courts found themselves in a bind with respect to financing programs unrelated to the lawsuit but seeming meritorious to them and went to the state treasury for lack of ready funding elsewhere; or the lower courts have decided to make an award of funds for the educational components because of the state's past action in other areas. Either reasoning is specious. The first simply cannot be tolerated in light of federalism, and the second is clearly violative of the principles pronounced in *Edelman v. Jordan*, *supra*.

A decision allowing the lower courts' order of the expenditure of unappropriated state funds in direct contradiction to state law would be intolerable. To allow a federal court to order the funding of a local program of this nature from state funds which are unappropriated certainly expands the power of the federal judiciary. In a word, the federal court would become a "super legislature." If the principles of self-determination and self-governing through elected representatives (being mindful of constitutional imperatives) is to have any meaning, the action at issue in this litigation cannot be allowed to stand.

CONCLUSION

For the reasons stated herein, *amicus* would urge this Court to remand this cause to the United States Court of Appeals for the Sixth Circuit with instructions to delete any orders of expenditures of state funds for the previously discussed educational components.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, ET AL., *Appellants*

v.

RONALD BRADLEY, ET AL., *Appellees*

On Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICUS CURIAE ON BEHALF OF THE
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October Term, 1976
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Appellants
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Appellees

*On Certiorari to the United States Court of Appeals
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BRIEF AMICUS CURIAE ON BEHALF OF THE
COMMONWEALTH OF PENNSYLVANIA AND
THE NATIONAL ASSOCIATION OF ATTOR-
NEYS GENERAL

INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the rules of this Court, the Commonwealth of Pennsylvania, by its Attorney General, and the National Association of Attorneys General submit this brief *amicus curiae*. The Common-

wealth of Pennsylvania, like the State of Michigan, has been, and is presently involved in litigation in federal courts in which plaintiffs seek relief which may potentially cost the state millions of dollars to implement. See, e.g. *Halderman v. Pennhurst*, C.A. No. 74-1345 (E.D. Pa. filed May 30, 1974). The precedent set by the Sixth Circuit Court of Appeals in this case, allowing a federal district court to order state defendants, contrary to the United States' as well as the state's own constitutional mandates, to expend monies in excess of specific appropriations, is a dangerous one not only to Michigan and Pennsylvania, but to the continued vitality and preservation of our federalist system.

Virtually identical provisions of the Constitutions of Michigan and Pennsylvania prohibit the payment of money from the state treasury except by lawful appropriation.¹ These state constitutional provisions are rendered virtually meaningless if a federal court is permitted to order the expenditure of unappropriated state monies for its own directed purposes. The primary function of the Michigan legislature is usurped by the order below. And the delicate balance demanded by our federalist form of government is severely tested by the lower court's unprecedented assumption of the prerogatives of the state itself.

¹ M.C.L.A. Const. Art. 9, §17 provides:

"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

Pa. Const. Art. 3, §24 provides in relevant part:

"No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers."

The Commonwealth of Pennsylvania thus has a strong interest in urging that the usurpation of state power by the federal courts below be corrected, there by assuring mutual regard for the respective powers of the states of this union and the federal judiciary.

ARGUMENT

I. The Eleventh Amendment Prohibits a Federal Court From Ordering a State To Spend Unappropriated State Funds

The order of the district court, affirmed by the circuit court, required the State of Michigan to pay fifty percent of the excess costs for implementing specific educational programs in the Detroit School District. Such relief is barred by the Eleventh Amendment. A federal court simply does not have the power to order the expenditure of unappropriated state funds for specific programs mandated by that court.

A brief description and history of the interpretation of the Eleventh Amendment is necessary to properly understand the issue in this case. As a result of the Supreme Court's opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and the outcry it produced, see, C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 46-74 (1972), the Eleventh Amendment² was formally ratified in January, 1798. Its prohibition, embodying the principle of state sovereignty, ap-

² The Eleventh Amendment provides:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

plies to suits brought by citizens of one state against another state, as well as to suits brought by citizens against their own state. *Hans v. Louisiana*, 134 U.S. 1 (1890). The prohibitions expressed by the Amendment apply not only in cases where a state is a party of record, *Osborn v. Bank of the United States*, 19 U.S. 405 (1821), but also to cases in which the state is the real party in interest. *Ex parte Ayers*, 123 U.S. 443 (1887); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

The early history of the Eleventh Amendment is succinctly summarized by Justice Gray, dissenting in *United States v. Lee*, 106 U.S. 196 (1882):

"In those cases in which judgments have since been rendered by this court against individuals concerning money or property in which a state had an interest, either the money was in the personal possession of the defendants and not in the possession of the state, or the suit was to restrain the defendants by injunction from doing acts in violation of the constitution of the United States." (Citation omitted.) 106 U.S. at 242.

Thus, the primary purpose of the Eleventh Amendment was to protect states, even though not parties of record, from actions seeking money actually in the state treasury and to similarly protect state officials except when their specific actions were challenged as violating the United States Constitution.

Louisiana v. Jumel, 107 U.S. 711 (1883), further developed the protections afforded the states by the

Eleventh Amendment. The State of Louisiana issued bonds in 1874 and obligated itself to levy annual taxes on property until the bonds were discharged. In 1880 a new constitution was adopted by Louisiana which prevented state officials from using the revenue collected from previous taxes to pay the interest on the bonds falling due in January 1880, or to pay principal and interest falling due thereafter. Three bondholders brought suit in federal court claiming that Louisiana had unconstitutionally impaired their contracts.

The Supreme Court did not deny that Louisiana violated its contract. *Id.* at 721. But the question addressed was:

"[W]hether the contract can be enforced notwithstanding the constitution, by coercing the agents and instrumentalities of the State, whose authority has been withdrawn in violation of the contract, without having the State itself in its political capacity a party to the proceedings." *Id.* at 721.

Chief Justice Waite characterized the relief requested as follows:

"The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme pow-

er has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." *Id.* at 721.

Justice Waite concluded for the Court: "there is nothing in any of the cases in this court that are relied on which, to our minds, authorizes any such relief as is asked." *Id.* at 724. *Jumel's* reasoning compels a finding that the lower courts here exceeded their constitutional authority by, in effect, abrogating laws which the people of Michigan have determined to be necessary for the fiscal control of their government. *Jumel* again:

"The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too in a proceeding in which the State, as a State, was not and could not be made a party. *It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.* When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judg-

ment that may be rendered, then such coercion may be employed for that purpose. *But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.* In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power." (Emphasis added.) *Id.* at 727-28.

Jumel clearly prohibits a federal court from disregarding a State's own constitutional mandates and from replacing the power of the state legislature to make appropriations with its own unchecked and unguarded orders. There can be no doubt that the relief ordered by the lower court runs directly against the State of Michigan. Its sovereign power to manage the public fisc cannot be so invaded. Such relief is barred by the Eleventh Amendment.

The principles enunciated in *Louisiana v. Jumel* were reaffirmed in *Hagood v. Southern*, 117 U.S. 52 (1886), and again in *Ex parte Ayers*, 123 U.S. 443 (1887). *Hans v. Louisiana*, 134 U.S. 1 (1890), is most frequently cited for the proposition that a state cannot be sued without its consent in federal court by its own citizens. But the Court's opinion is also memorable for its recognition of the inherent and exclusive powers of state legislatures even when the legislature fails to discharge the State's public debts.

"It is not necessary that we should enter upon an examination of the reason or expediency

of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." 134 U.S. at 21.

As in *Hans*, the legislature of Michigan may risk the "odium of the world" by not allocating funds sufficient to assist the Detroit School Board in meeting its obligations. But the federal courts must allow the Michigan legislature to assume this risk. A federal court simply cannot compel state officials to spend monies which the legislature has not appropriated. Such compulsion would run directly against the state. And the presence of the state itself in a federal proceeding, is, pursuant to the Eleventh Amendment, beyond the jurisdiction of the federal court.

During the final years of the nineteenth century and the early years of the twentieth century, the Court continued to develop the principle that the Eleventh Amendment would not bar a suit against state officers when their actions were taken pursuant to an unconstitutional statute or were beyond the authority provided by valid laws. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891); *Scott v. McDonald*, 165 U.S. 58 (1897); *Smyth v. Ames*, 169 U.S. 466 (1898); *Prout v. Star*, 188 U.S. 537 (1902); *McNeil v. Southern Railroad*, 202 U.S. 543 (1905). During this period, the Court again recognized in *Smith v. Reeves*, 178 U.S. 436 (1899), that the Eleventh Amendment barred an action seeking to compel a state officer to pay a sum certain from the state treasury.

Ex parte Young, 209 U.S. 123 (1908), is considered the watershed case on the Eleventh Amendment. The court established that when a state official acts pursuant to an unconstitutional statute he is no longer protected by the state's sovereignty. An action in equity seeking to enjoin the enforcement of an unconstitutional statute is against the office holder in his individual capacity and therefore not barred by the Eleventh Amendment. Clearly then a state official acting under a constitutionally valid statute remains cloaked with the immunity afforded by the Eleventh Amendment. An injunction against its enforcement would necessarily run against the state itself. Federal courts are simply without the constitutional power to enter such an order.

The Court continued after *Ex parte Young* to recognize the constitutional limitations on the power of

federal courts to entertain actions actually against a state. In *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909), the Court held that an action could not be maintained to compel a state to make specific performance on a contract by a state. *In re State of New York*, 256 U.S. 409 (1921), extended that principle to apply to cases which would require the state to make "pecuniary satisfaction for any liability". *Id.* at 501.

More recent decisions of this Court convincingly reject a boundless concept of the power of the federal judiciary. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Edelman is perhaps the most important Eleventh Amendment case since *Ex parte Young*. This Court reiterated the canons of Eleventh Amendment jurisprudence and for the first time attempted to clearly define the scope of relief not forbidden by the Amendment's operation. Prospective injunctive relief requiring officials to cease improper action, even if it has an ancillary effect on the state treasury is permissible. But the order now under review is a remarkably different matter. The court has not ordered the State of Michigan simply to cease unconstitutional actions. Indeed, neither the method by which Michigan finances its public schools nor the educational programs in the City of Detroit have ever been found to be constitutionally inadequate.

The remedy ordered by the lower court is not to remedy constitutionally deficient programs. The

court, in effect, made a direct assessment against the treasury of the State of Michigan to pay for changes to programs never found to be constitutionally inadequate.

It is precisely such a levy on state funds by a federal court which the Eleventh Amendment is designed to prohibit.

II. The Lower Court's Order Violates the Principles of Federalism

A principle tenet of American democracy is that only a popularly elected legislature may control the government's treasury. Article I, Section 9, Clause 7 of the United States Constitution provides: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."³

This fundamental principle inherent in our government has been frequently recognized by this Court. *East St. Louis v. Zelby*, 110 U.S. 321, 324 (1884); *Cincinnati Soup Co. v. United States*, 301 U.S. 308, 321 (1937). And in *United States v. Standard Oil Co.*, 322 U.S. 301 (1947), this Court recognized that: "Congress, not this court or the other federal courts, is the custodian of the national purse". *Id.* at 314.

The federal judiciary is similarly restrained with respect to a state's treasury. *Steward Machine Co. v.*

³ See *supra*, n. 1, for similar provisions of the Michigan and Pennsylvania Constitutions.

Davis, 301 U.S. 548, 595 (1937); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Even in *Edelman*, this Court clearly indicated that a state's own power to appropriate the funds in its treasury could not be abrogated by the ruling of a federal court. Here, where the federal court has abrogated that inherent power of the state, the programs for which Michigan is forced to pay are not even designed to remedy programs found to be constitutionally inadequate. This Court, as in *Edelman*, must again conclude that such encroachment by the federal judiciary on the prerogatives of the state legislature are contrary to the fundamental principles of our democratic and federalist system.

CONCLUSION

For the foregoing reasons and authorities, the Commonwealth of Pennsylvania and the National Association of Attorneys General respectfully urge this Court to reverse the order of the Court of Appeals requiring the State of Michigan to pay at least fifty percent of the excess costs of implementing the educational component programs mandated by the District Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

—
No. 76-447
—

WILLIAM G. MILLIKEN, ET AL., *Appellants*,

v.

RONALD BRADLEY, ET AL., *Appellees*.

—
On Certiorari to the United States Court of Appeals
for the Sixth Circuit
—

MOTION OF THE NATIONAL ASSOCIATION OF
ATTORNEYS GENERAL FOR LEAVE TO JOIN
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-447

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RONALD BRADLEY, ET AL., *Appellees*.

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for the Sixth Circuit

**MOTION OF THE NATIONAL ASSOCIATION OF
ATTORNEYS GENERAL FOR LEAVE TO JOIN
THE BRIEF AMICUS CURIAE OF THE
COMMONWEALTH OF PENNSYLVANIA**

The membership of the National Association of Attorneys General consists of the Attorney General of each State and Territory. It exists to facilitate and nurture the effective conduct of the office of Attorney General and to provide a means to its members to

speak jointly on issues. The members of the Association have an interest in the outcome of this case in that the legal rights and obligations of their client States will be affected by the judgment of the Court herein. The Association therefore respectfully moves for leave to join the Commonwealth of Pennsylvania in its Brief Amicus Curiae.

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FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976
No. 76-447

Supreme Court, U. S.

FILED

FEB 14 1977

MICHAEL WODAK, JR., CLERK

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Petitioners,

—against—

RONALD G. BRADLEY, *et al.*,
Respondents.

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INTERESTS OF AMICI

The Puerto Rican Legal Defense & Education Fund, the Mexican-American Legal Defense & Educational Fund, and the Center for Law & Education have obtained the consent of the parties in this case to the filing of this brief amici curiae¹ on behalf of their clients Aspira of America, Inc. ("Aspira") and Latin Americans for Service and Economic Development, Inc. ("LASED").

Aspira is a not-for-profit corporation organized under the laws of New York. Its primary purpose is to develop the intellectual and creative capacities of Puerto Ricans in the United States and Puerto Rico. As part of its overall efforts, Aspira seeks to establish and expand programs to improve educational opportunities for Puerto Ricans.

LASED is a not-for-profit corporation organized under the laws of Michigan. It provides a multitude of services to Detroit's Hispanic communities, including programs to improve educational opportunities. Members of LASED have served on the Detroit Board of Education's Superintendent's Advisory Committee on Desegregation, which reviews implementation of those educa-

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The letters of consent have been filed with the Clerk of the Court.

tion components of the Detroit desegregation plan that are not under challenge. Additionally, LASED has actively monitored the activities of the Court Advisory Committee on Desegregation to insure that the unchallenged educational components of the desegregation plan are implemented.

Because of their active involvement in improving educational opportunity for Hispanic students, both Aspira and LASED have a continuing interest in assuring that the desegregation plan for Detroit will include compensatory education programs found necessary by the local school board and the local federal court to remedy the present effects of past discrimination.

QUESTION PRESENTED

Whether the district court, upon finding intentional and systematic de jure school segregation, properly included in its remedial decree certain compensatory educational programs which were endorsed and for the most part even proposed by local school officials, and which the court found necessary to desegregate the Detroit schools effectively.

STATEMENT OF FACTS

(a) Introduction

For nearly two decades, the State of

Michigan² has substantially contributed to the establishment and maintenance of intentional and massive de jure segregation in the Detroit public schools. After extensive hearings, the district court found that the state's discriminatory practices were significant, pervasive, and responsible in part for the segregation that exists in the Detroit school system. 338 F. Supp. 582, 592. The Sixth Circuit Court of Appeals held those findings supported by ample evidence. 484 F.2d 215, 241. This Court, without disturbing the fact finding of the district court, remanded the case for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." Milliken v. Bradley, 418 U.S. 717, 753 (1974) (Milliken I).

At the hearings on remand, Detroit's Board of Education (the "local board") submitted a desegregation plan which included the following three educational components: in-service training for teachers, non-discriminatory student testing procedures, and counselling and career guidance programs. The state not only endorsed the in-service

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References to the state are to be read as references to the state public officials named as defendants. Milliken v. Bradley, 418 U.S. 717, 721 (1974).

teacher training and guidance and counseling programs but argued that they "deserve[d] special emphasis." 402 F. Supp. 1096, 1118. The remaining educational component challenged by the state is the remedial reading program. Although this program was not originally proposed by the local board, the local board has argued in this Court and in the Sixth Circuit that the reading program is necessary to remedy the effects of segregation upon Detroit's school children. 540 F.2d 229, 241.

This Court must now decide the limited issue of whether the district court, after extensive hearings and on the basis of ample record evidence, exceeded its authority in ordering the compensatory educational programs that were agreed to and for the most part proposed by the local school board.³

(b) Findings Below

After lengthy hearings, the district court found that the various remedial pro-

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A second issue in this case is whether the state, once found to have contributed substantially to the massive and systematic de jure segregation in Detroit's public schools, could properly be ordered to share in the cost of implementing the educational components of the desegregation plan. This issue is not discussed by amici because they do not have a unique interest in the question of the appropriate governmental funding source for the educational components of the desegregation plan.

grams now under challenge were necessary "to restore quality education which had deteriorated due to past acts of discrimination." 402 F. Supp. at 1133. The court stated:

We approve the Board's view that the [desegregation] plan must include educational components allowing for further desegregation and assuring a successful desegregative effort. Id. at 1126.

Each of the remedial measures directed by the district court was premised on a specific finding of its necessity to the goal of desegregation.

(1) Specifically, as to reading and communication skills, testimony established that the reading program ordered was an important step in facilitating desegregation (A56). The district court, relying on the record (A7-8, A12-13, A55-57, A61, A80-81, A92, A99-101; Record, Vol. XXII, 44-45; Vol. XIX, 37-38)⁴ and the informed views of

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The following method of citation is used here to refer to portions of the transcript of the proceedings in the district court:

i) Portions of the record reproduced in the appendix are cited "A" followed by the page number, e.g. (A12); and

ii) Other portions of the record are cited by the volume followed by the page number, e.g. (Record, Vol. XIX, 44-45).

educational authorities, found that compensatory reading programs were a prerequisite to assuring students' ability to learn in substantive courses because the students had been deprived of comparable foundation skills learning earlier in their education. The court stated:

There is no educational component more directly associated with the process of desegregation than reading....To eradicate the effects of past discrimination, a remedial reading program should be instituted immediately to correct the deficiencies of those mid-way in their educational experience.
402 F. Supp. at 1138-39.

(2) In-service training gives teachers "an improved understanding of race, of race relations, [and] of racial understanding.. .." (A41). It informs the teachers of "the importance of dealing with all children fairly, equally, even handedly..." (A40), for when white and black children are first placed together in a classroom "certain kinds of problems surface that are unlike those that existed before" (A33). Thus, on the basis of the full record, (A7-8, A12-13, A33, A38, A40-41, A54, A80-82, A86-87, A89-90, A92-94; Record, Vol. XXX at 116; Vol. XII at 142; Vol. XIX, at 92-93), the district court stated:

A comprehensive in-service training program is essential to a system undergoing desegregation. A conversion to a unitary system cannot be successful absent an in-service

training program for all teachers and staff....[to] ensure that all students are treated equally in the educational process. 402 F. Supp. at 1139.

(3) Non-discriminatory testing insures that resegregation will be avoided. Stuart Rankin, Assistant Superintendent for Research, Planning and Evaluation for the Detroit School system, testified, "One of the most important things to guarantee is that having desegregated the school, we don't resegregate the classes within the school through homogeneous grouping or other techniques that have been used over the ages in education for grouping youngsters." (A39) The district court found:

Of great importance to a system undergoing desegregation is the assurance that tests administered to students are free from racial, ethnic and cultural bias. Black children are especially affected by biased testing procedures.... [T]he discriminatory use of test results can cause resegregation[The defendants] are constitutionally mandated to eliminate all vestiges of discrimination, including discrimination through improper testing. 402 F. Supp. at 1142.

(4) Counselling and career guidance programs assure that discrimination in the relations between counselors and students is eliminated (A34), thus facilitating the adjustment process students necessarily

undergo when assigned to new schools (A62). On the basis of record evidence, the court concluded (A7-8, A12-13, A30-31, A34-35, A51-53, A55, A59-60, A62-63, A80-81, A88, A94-95; Record, Vol. XXIII-A at 86, 128 and 151; Vol. XXX at 129):

School districts undergoing desegregation inevitably place psychological pressures upon the students affected. Counselors are essential to provide solutions to the many problems.... [and]...the success of the vocational and technical schools created herein [by the desegregation plan] depends upon the efforts of counselors whose guidance is essential to students seeking a career. 402 F. Supp. at 1143.

The Court of Appeals for the Sixth Circuit found the district court's findings of fact as to the educational components "not clearly erroneous, but to the contrary [they are] supported by ample evidence." 540 F.2d at 241. The Court of Appeals continued:

The need for in-service training of the educational staff and development of non-discriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students

are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.

We agree with the District Court that the reading and counselling programs are essential to the effort to combat the effects of segregation.

Without the reading and counselling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish.

[W]e conclude that the findings of the District Court as to the Educational Components are supported by the record. 540 F.2d at 241.

ARGUMENT

THE DISTRICT COURT'S EQUITABLE REMEDIAL POWER INCLUDED THE AUTHORITY TO ORDER IMPLEMENTATION OF A DESEGREGATION PLAN WHICH CONTAINED EDUCATIONAL COMPONENTS THAT WERE EITHER PROPOSED OR APPROVED BY THE LOCAL SCHOOL AUTHORITIES AND WERE SUPPORTED BY AMPLE EVIDENCE AS BEING NECESSARY TO DESEGREGATE DETROIT'S PUBLIC SCHOOLS EFFECTIVELY

The district court found on the evidence (see pages 4-8, ante) that the programs proposed by the local school board were necessary to desegregate Detroit's public schools effectively. This Court's reviewing function is limited to scrutinizing the record for sufficient factual support for the scope, the reasonableness and the feasibility of the remedy. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 31 (1971). This narrow standard of review is grounded in this Court's consistent reliance upon the informed judgment of the lower federal courts to determine appropriate remedial measures for eliminating school segregation and its effects. Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II); Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968).

The issue in this case is a limited one. Because the plan adopted by the district court was almost entirely generated and urged upon the court by the local school authorities, it is not necessary for this Court to determine when and to what extent a district court may reject a remedial plan proposed by a local school district and supplant it with a plan forged by the court. The court below scrupulously adhered to this Court's directive to place "primary responsibility" upon local school authorities for "elucidating, assessing and solving" local school problems in eliminating unlawful segregation. Brown II, supra, 349 U.S. at 299; Swann, supra, 402 U.S. at 12; United States v. Montgomery County Board of Education, 395 U.S. 225, 226 (1969). It properly focused on whether the plan put forth by the local school board promised immediately and effectively to disestablish the dual school system, Green, supra, 391 U.S. at 439, and refrained from substituting its own judgment for that of the school board as to what remedial measures were necessary and appropriate. Swann, supra, 402 U.S. at 16; cf. San Antonio School District v. Rodriguez, 411 U.S. 1, 42 (1973). Likewise, it is not necessary for the Court to determine under what circumstances a desegregation plan might be required to contain remedial educational components.

The district court's authority to approve the remedial educational components proposed by the local school board

is rooted in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I). Brown I made clear that deprivation of equal educational opportunity is inherent in segregated schooling. Id. at 493. Segregation, the court observed, denotes inferiority, which affects the motivation of minority children to learn. Id. at 494. Summarizing its findings, the court stated:

Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. Id. at 494.

To fulfill the promise of Brown I to eliminate racial discrimination and its effects from public education, school officials can be required to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," Green, supra, 391 U.S. at 437-38 and "to eliminate from the public schools all vestiges of state-imposed segregation." Swann, supra, 402 U.S. at 15. Accord, Keyes v. School District No. 1, 413 U.S. 189, 200 (1973); Wright v. Council City of Emporia, 407 U.S. 451, 463 (1972).

The desegregation plan the court adopted was designed to "counteract the continuing effects of past school segregation...," Swann, supra, 402 U.S. at 28; "to eliminate the effects of past discrimination...."

Green, supra, 391 U.S. at 438 n. 4, quoting from Louisiana v. United States, 380 U.S. 145, 154 (1965); and to preclude resegregation, Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968). In fashioning such relief, this Court has repeatedly stated, the district court has broad power to tailor the remedy to the particular circumstances presented so as to ensure its effectiveness. Hills v. Gautreaux, ___ U.S. ___, 44 U.S.L.W. 4480, 4487 (1976); Milliken I, supra, 418 U.S. at 737-738; Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971); Swann, supra, 402 U.S. at 15-16, 25; Brown II, supra, 349 U.S. at 300.⁵ What the district court did in this case was to order a remedy eliminating not only the roots of segregation (student assignment practices), but also its branches--the adverse educational consequences.

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This Court's decisions in Pasadena City Board of Education v. Spangler, ___ U.S. ___, 49 L.Ed. 2d 599 (1976) and Milliken I, supra, are not to the contrary. According to Milliken I, a district court may not subject to its remedial power separate school districts not shown to have committed racially discriminatory acts. Under Pasadena, once a dual school system is dismantled, the district courts have no authority annually to readjust attendance zones in order to achieve a preferable student racial mix. Id. at 607-08. Neither Milliken I nor Pasadena prohibits the district court from initially approving educational components which are part of a desegregation plan proffered by the local school officials and are found

Segregative student assignment practices have characterized the Detroit school system continuously since 1950. Bradley v. Milliken, 338 F. Supp. 582, 587-89 (E.D. Mich. 1971). The unequal educational opportunity inherent in that segregated schooling has been the lot of Detroit school children for many years. In fashioning a remedy for the injury, the district court properly concerned itself with making its student assignment plan effective and meaningful. To do this, it ordered measures that it found necessary to compensate for previous deprivations imposed by that segregated school system.

Other district courts, recognizing the need to attend to years of unequal education imposed by segregative student assignment practices, have also fashioned remedies that included more than the simple elimination of the segregative student assignment practices. This Court has left such remedial orders undisturbed when they have included measures necessary to establish a unitary school system free from the effects of racial segregation. These holdings were soundly grounded not only in established remedial principles, but also in academic and field studies which document the necessity for remedial measures, such as those involved in this case, to undo the effects of past discrimination and to aid

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necessary effectively to remedy unlawful segregation.

in desegregation.⁶

For example, in Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1976), aff'd, 530 F.2d 401 (1st Cir.), cert. denied, ___ U.S. ___, 44 U.S.L.W. 3719 (1976), the district court ordered the implementation of a desegregation plan calling for a dramatically different educational system involving a "multiplicity of measures," 401 F. Supp. at 234, beyond the mechanical distribution of students. These measures included magnet school programs, the involvement of colleges and universities in developing adequate educational programs, and the creation of parent and student advisory councils. The basis for

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See, for example, United States Commission on Civil Rights, Desegregation of the Nation's Public Schools, August, 1976; Forehand and Ragosta, A Handbook for Integrated Schooling, July, 1976 (United States Office of Education); Orfield, "How To Make Desegregation Work: The Adaptation of Schools To Their Newly-Integrated Student Bodies," 39 Law and Contemporary Problems 314 (1975); United States Commission on Civil Rights, School Desegregation in Ten Communities, June, 1973 (Clearinghouse Publication 43); Preparing for School Desegregation: A Training Program For Intergroup Education, June, 1972 (Information Dissemination Module, Western Regional School Desegregation Projects, University of California); United States Department of Health, Education and Welfare, Planning Educational Change, Integrating the Desegregated School, 1970, (Vol. III); United States Department of Health, Education and Welfare, Planning Edu-

this decree was a history of segregative student and faculty assignment practices which intentionally established and maintained a dual school system in Boston. Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass.), aff'd sub nom. Morgan v. Kerri-gan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975). The district court grounded its authority for ordering implementation of the plan in the remedial principles set forth in Brown II, Milliken I, Davis, Swann, and Green, stating:

The simplicity of the requirement that affirmative acts of discrimination must end does not, however, imply simplicity of enforcement. The consequences of years of segregative practices will be eradicated only with great effort and understanding... [H]elp that in other circumstances would be only desirable... becomes essential. 401 F. Supp. at 230-31.

To make the desegregation remedy effective necessitated not only banning active discrimination but also efforts to meet the special problems caused by "the persisting effects of past discrimination and the difficulties of transition, for both black and white students, from segregated to desegregated schooling." Id. at 234.

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cational Change, Human Resources in School Desegregation, 1969 (Vol. II); Board of Education of the City of New York, Planning for the Achievement of Quality Integrated Education, June, 1968.

In Oliver v. Kalamazoo Board of Education, 346 F. Supp. 766 (W.D. Mich.), aff'd, 448 F.2d 635 (6th Cir. 1971), the district court enjoined local school board members from setting aside a school desegregation plan adopted by a former board and from firing teachers and counsellors hired as part of the overall desegregation efforts of the former board. Recognizing the need for compensatory educational components in a desegregation plan (such as the hiring of counsellors and teachers especially trained for a newly desegregated school system), the district court stated:

[A]s a result of the segregated conditions of the schools, black school children are educationally deprived, intellectually stifled, and academically and psychologically uninspired, 346 F. Supp. at 776.

* * *

The presence of black and white staff members sensitive to problems of communication between the races helps to free children's minds to learning by increasing their faith and confidence in the school as an institution and by diminishing the likelihood of racial tensions fostered by lack of understanding. Id. at 786.

See also, Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich. 1973), aff'd sub nom. Oliver v. Michigan State Board of Education, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975).

In United States v. Jefferson Board of Education, 372 F.2d 836 (5th Cir.), aff'd en banc, 380 F.2d 385 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967), the Fifth Circuit Court of Appeals, acknowledging that children in segregated schools suffer educational deprivation and psychological damage, included in the proposed desegregation decree appended to its opinion a provision for remedial education programs. 372 F.2d at 900. The court stated that the remedial programs were necessary to overcome past inadequacies of all black schools. For other examples of similar remedial orders, see United States v. Missouri, 388 F. Supp. 1058, 1062 (E.D. Mo.), aff'd, 523 F.2d 885, 887 (8th Cir. 1975) (ordering in-service teacher training, a bi-racial committee and community education); McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975) (barring student assignment by ability groupings until the school system "has operated as a unitary system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday's educational disparities." 508 F.2d at 1021); Arvizu v. Waco Independent School District, 373 F. Supp. 1264, 1279-80 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974) (ordering teacher hiring, a tri-ethnic committee, bilingual-bicultural programs, special education); Singleton v. Jackson Municipal Separate School District, 426 F.2d 1364, 1370 (5th Cir. 1970), cert. denied, 402 U.S. 944 (1971) (establishing a bi-racial committee to make reports to the district court and to recommend to the school board ways to establish and maintain

a unitary system); Smith v. St. Tammany Parish School Board, 302 F. Supp. 106, 110 (E.D. La. 1969), aff'd, 448 F.2d 414 (5th Cir. 1971) (requiring remedial educational programs and in-service teacher training); United States v. Texas, 447 F.2d 441, 448 (5th Cir. 1971) (requiring compensatory education programs); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (requiring compensatory education and abolishing the student tracking system based upon discriminatory testing); Plaquemines Parish School Board v. United States, 291 F. Supp. 841, 846 (E.D. La. 1967), aff'd as modified, 415 F.2d 817 (5th Cir. 1969) (finding the order requiring remedial educational programs "a proper exercise of the [district] court's discretion," 415 F.2d at 831.); Lee v. Macon County, 267 F. Supp. 458 (M.D. Ala.), aff'd per curiam sub nom. Wallace v. United States, 389 U.S. 215 (1967) (requiring remedial educational programs).

Congress, as well, has recognized that desegregation usually involves more than transferring students; its funding of remedial services, teacher training supportive services, and the like indicates that recognition. 20 U.S.C. §1606 (a).

In analyzing this issue of remedy, the state recognizes the correct starting point is the nature of the constitutional violation. Under the state's theory, however, the remedy in this case must be limited to correcting unlawful student assignment practices because the only constitutional violation found was unlawful pupil assign-

ment.⁷ (Brief of Petitioners, pages 20-21.) But examining the nature of the constitutional violation found here, as in Brown I, in terms of the remedial principles set forth in Swann, Davis, and Green, wholly undermines the state's theory.

In support of its argument that the only permissible remedy is student re-assignment, the state compares the desegregation plan adopted in this case with those adopted in other cases and found constitutionally sufficient even though they did not include educational components (Brief of Petitioners, p. 20). This comparison

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To the extent that the defendant's standard is based on the concurring opinion of Chief Justice Burger and Justices Rehnquist and Powell in Austin Independent School District v. United States, ___ U.S. ___, 45 U.S.L.W. 3413 (December 7, 1976), that reliance is misplaced. The district court's order was entirely consistent with the reasoning of the Austin concurring opinion. Segregation in the Detroit school system, the court found, affected several of that system's educational programs. By proposing or at least agreeing to a desegregation plan that included compensatory educational components, the local school board, indeed the state, conceded as much. Inclusion of these components, therefore, did not "exceed the effect of the constitutional violation" and was "remedial rather than punitive." Id.

misses the mark because it ignores this Court's recognition that formulating an effective desegregation decree involves the resolution of "varied local school problems." Brown II, supra, 349 U.S. at 299. The exercise of discretion by one district court in particular factual circumstances, although instructive, is not intended to and cannot establish constitutional limits for another district court faced with other circumstances. Morgan v. Kerrigan, supra, 530 F.2d at 414 n. 17. Rather, those limits are prescribed by the standards set forth in the decisions of this Court discussed above, to which the district court carefully adhered.

Upon the facts presented, the district court's remedy did represent "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Board of Commissioners, supra, 402 U.S. at 37. The district court found intentional, purposeful, and massive de jure segregation. It found not only segregative school zoning and student assignment practices. It also found school construction site selection which maintained and even increased school segregation. It found discriminatory feeder and busing practices, including intact busing. It found segregative optional attendance zones that affected a substantial portion of the students, schools and faculty within the Detroit school system. Further, the district court found that this intentional and purposeful action of local and state officials significantly contributed to segregation in a

substantial portion of the school system. Bradley v. Milliken, supra, 484 F.2d at 241.

Systemwide liability was thus clearly shown, Keyes v. School District No. 1, supra, 413 U.S. at 201, 214, and common sense indicates that proven discrimination pervaded the school system as a whole. Id. at 201. This discriminatory action, the district court concluded, produced the educational deprivation and psychological damage that are inherent in segregated schooling. Brown I, supra, 347 U.S. at 493-4. To remedy these direct consequences of intentional school segregation, the court ordered the compensatory programs recommended by local school authorities and supported by record evidence as necessary.

The scope of the remedy, therefore, did not exceed the proven violation. The state did not demonstrate that the programs were unrelated to or inconsistent with the requirement to eliminate segregation "root and branch." Likewise, the state did not succeed in showing that the remedial educational programs were unrelated to or inconsistent with the segregative conduct that the court found. The district court thus properly directed the implementation of the educational components of the desegregation plan.⁸

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The evidence in this case amply demonstrated the necessity of the approved programs resulting from de jure segregation. There is, therefore, no need for

It has been noted that "restoring the victims of unconstitutional segregation requires far more than eliminating the specific, demonstrable effects of proven discriminatory acts. Restoration is necessarily a complex and widespread process." Morgan v. Kerrigan, supra, 530 F.2d at 418 n. 23. Improved quality of education, for its own sake and apart from remedying the effects of illegal conduct, concededly is a general goal beyond the scope of a desegregation court's injunctive authority. Nothing the district court did here is inconsistent with that recognition. The local school board and the district court agreed that the specific educational programs were needed both to remedy the effects of past discrimination and to alleviate the problems inevitably encountered during a period of transition to

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the Court now to determine the extent to which a district court may approve or even compel compensatory educational components where the link between the proven violation and the proposed remedy is less apparently based on evidence in the record.

a unitary school system.⁹ Including these programs seemed, to those closest to the problems, obviously necessary in a decree designed to unravel the effects of segregation. There is no basis, in fact or in law, for this Court to fault that conclusion.

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In other areas, this Court has sanctioned the exercise of equitable remedial power over activities broader than the specific ones that were the bases of the violation found. In Ford Motor Company v. United States, 405 U.S. 562 (1972), for example, the district court held that Ford's acquisition of a spark plug plant (Auto-lite) violated §7 of the Celler-Ke-fauver Antimerger Act. The district court's remedial decree required not only divestiture of the spark plug plant, but five other specific acts designed to restore a competitive market. 405 U.S. at 572. Among other things, the decree prevented Ford from manufacturing its own spark plugs, an undertaking which absent the unlawful purchase it would have been free to do. In refusing to upset the district court's decree, this Court noted that divestiture is a "start" toward restoring the pre-acquisition situation. 405 U.S. at 573. Comparably, in United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), a company found to have violated the Sherman Act was subject to a panoply of restrictions upon its business activities that was much more detailed and limiting than those imposed by the Sherman Act itself. See also, International Salt Co. v. United States, 332 U.S. 392 (1947).

CONCLUSION

For all the foregoing reasons, that part of the district court's order requiring the implementation of the educational components of the desegregation plan should be affirmed.

February 14, 1977

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-447

WILLIAM G. MILLIKEN, *et al.*, Appellants,

v.

RONALD BRADLEY, *et al.*, Appellees.

On Certiorari to the United States Court of Appeals
for the Sixth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE ON BEHALF
OF THE MICHIGAN EDUCATION ASSOCIATION**

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The Michigan Education Association, a Michigan non-profit corporation, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case, pursuant to Rule 42 of this Court. The consent of the attorneys for Petitioners William G. Milliken, *et al.*, Respondent Board of Education of the School District of the City of Detroit, and Respondent Detroit Federation of Teachers has been obtained. The consent of the attorneys for Respondents Ronald Bradley, *et al.* was requested but not granted.

The Michigan Education Association is a Michigan non-profit corporation composed of approximately 95,-

000 Michigan public elementary, secondary, and higher education teachers, and as such, is the largest professional and collective bargaining association in Michigan public education. In this capacity, the Michigan Education Association has a vital interest, on behalf of its members, in the nature of decisions affecting the Michigan system of educational finance, and in assuring the quality of educational delivery systems throughout the State. In doing so, the Association maintains a substantial involvement in decision-making at every level of Michigan public education, including the Michigan Legislature, state education agencies, and local educational bodies.

In the instant case, the interest of the Michigan Education Association is in assuring that this Court be fully presented with an understanding of the structure utilized to generate revenues for Michigan schools.

The Michigan Education Association understands and accepts the notion that the primary issues before the Court do not turn on the questions of Michigan law discussed herein, but rather on the questions of the power of U.S. District Courts to act to remedy conditions of school segregation and the appropriateness of the remedies ordered here and approved by the Court of Appeals. Nor does the Michigan Education Association argue that in achieving this structure, this Court is obligated to leave the Michigan financing system intact. As to all of these points, the Michigan Education Association assumes for the purpose of this brief that the finding of the Court of Appeals is correct.

What does concern the Michigan Education Association is that in advancing their position on the major points of this contention, Petitioners Milliken, *et al.* have engaged in gross oversimplifications in their de-

scription of the responsibility of the central state government for funding public education in Michigan. Just as this Court found it necessary to characterize Michigan's procedures for administration of the day to day operation of schools in the first opinion issued in the case, *Bradley v. Milliken*, 418 U.S. 717 (1974), it appears inevitable that some characterizations of the system for funding education in the opinion will emanate from the present appeal, even though those funding mechanisms may not be critical to the outcome. To the extent that such characterizations are based on only partial information or misinformation which might affect judicial construction of that system at some later time, the members of the Michigan Education Association are at risk, and it is to alleviate that risk that this brief and motion are submitted. It is thus the belief of the Michigan Education Association that a full understanding of school finance in Michigan would be of assistance to this Court.

Therefore, in order to assist this Court in its resolution of the instant appeal, the Michigan Education Association requests the permission of this Court to file the attached Brief *Amicus Curiae*.

Respectfully submitted,

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INTEREST OF THE AMICUS

The interest of the Michigan Education Association is set forth in the Motion for Leave to File Brief *Amicus Curiae, supra*.

SUMMARY OF ARGUMENT

It is undisputed that public education in Michigan is a State responsibility. This Court found in the first opinion in this case that the State of Michigan had made a comprehensive delegation of the operations of its schools to local school districts. While local school districts certainly play a role in the raising of the revenue to finance the school operations which are within their purview, the delegation of state power

with regard to revenue raising is far less extensive than it is with regard to operations and revenue expenditure.

Under normal circumstances revenues come to a local school district through three sources: allocated millage, voted millage, and categorical aid. Allocated millage is effectively beyond the control of the district as to its rate. While voted millage has some of the appearances of being what might be described as "local money", in fact it is not. Through a financing scheme known as the "Bursley Bill", the voting of tax rates by school electors also determines the amount of payment of State Aid received by the school district in question. Furthermore, there is no basis by which a local school district may have access to general State Aid except through the voting of local tax rates. Thus the local tax rate and general State Aid are totally commingled in a single financing scheme, with the State effectively promising the provision, and threatening the withholding, of State funds in order to determine the local property tax rate.

Similarly, Categorical Aid is entirely within the control of the State. The local school district has no control whatsoever over which program priorities the State might choose to set with regard to educational programs funded through Categorical Aid.

The retention of control over school financing by the State becomes even more apparent when one considers how Michigan has reacted in cases of financial emergency. In those circumstances the State has acted in a highly centralized fashion, choosing to deal with each emergency on an *ad hoc* basis, and conditioning the emergency assistance in virtually every case on a stripping of local control over operations and expenditures from the district. Thus, while the ultimate resolution

of this case in all probability turns on issues other than the nature of the financing scheme of the State of Michigan, any support for any outcome that relies on an assertion that such a system is local and varied in nature, or that the State has made a complete and comprehensive delegation of the educational revenue raising function similar to its delegation of the operational function would be misplaced. The State of Michigan and its appropriate central state agents have retained not only the ultimate responsibility for financing education but a great deal of the direct responsibility as well.

ARGUMENT

I. ANALYSIS OF THE THREE MAJOR STATE-BASED SOURCES OF REVENUE FOR MICHIGAN SCHOOLS REVEALS THAT NONE ARE TRULY "LOCAL" IN NATURE, AND ARE RATHER PART OF A COMPREHENSIVE STATE SYSTEM OF REVENUE RAISING, AND EACH INVOLVES REVENUE SOURCES THAT ARE AT LEAST PARTIALLY EXTERNAL TO ALL BUT A FEW WEALTHY SCHOOL DISTRICTS.

This Court acknowledged in its original decision in this case, *Milliken v. Bradley*, 418 U.S. 717 (1974), two fundamental characteristics of the Michigan system of public education. The first, drawn from the Michigan Constitution of 1963 and reflected as well in each of the three State Constitutions which preceded it,¹ is that

"[e]ducation in Michigan belongs to the State . . . [and] is no part of the local self-government

¹ The Michigan Constitution of 1835 Art. X, § 3 contained the requirement that "[t]he Legislature shall provide for a system of common schools . . ." Article XIII, § 4, of the Constitution of 1850 provided that "[t]he legislature shall . . . provide for and establish a system of primary schools . . ." Likewise, Article XI, § 9, of the 1908 Constitution required that "[t]he legislature shall continue a system of primary schools . . ."

inherent in the township or municipality, except so far as the legislature may choose to make it such.” *Milliken v. Bradley, supra*, at 726 (footnote 5), quoting *Attorney General ex rel. Zacharias v. Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908).

By mandate of the people of the State through their duly adopted constitution, the Michigan State Legislature (and not local units of government) is obligated to “maintain and support a system of free public elementary and secondary schools as defined by law.” Mich. Const. 1963, Art. VIII, § 2.

The second fact noted by this Court is that the authority and responsibility for the day-to-day operation of public elementary and secondary schools has been extensively delegated by the State Legislature to statutorily created local school districts. *See, Milliken v. Bradley, supra*, at 742 (footnote 20). This Court painstakingly enumerated the countless statutory provisions by which the State had willingly surrendered its constitutionally-decreed control over the daily operation of the public schools:

“Under the Michigan School Code of 1955, the local school district is an autonomous political body corporate, operating through a Board of Education popularly elected. Mich. Comp. Laws §§ 340.27, 340.55, 340.107, 340.148, 340.149, 340.188. As such, the day-to-day affairs of the school district are determined at the local level in accordance with the plenary power to acquire real and personal property, §§ 340.26, 340.77, 340.113, 340.165, 340.192, 340.352; to hire and contract with personnel, §§ 340.569, 340.574; to levy taxes for operations, § 340.563; to borrow against receipts, § 340.567; to determine the length of school terms, § 340.575; to control the admission of non-

resident students, § 340.582; to determine courses of study, § 340.583; to provide a kindergarten program, § 340.584; to establish and operate vocational schools, § 340.585; to offer adult education programs, § 340.586; to establish attendance areas, § 340.589; to arrange for transportation of nonresident students, § 340.591; to acquire transportation equipment, § 340.594; to receive gifts and bequests for educational purposes, § 340.605; to employ an attorney, § 340.609; to suspend or expel students, § 340.613; to make rules and regulations for the operation of schools, § 340.614; to cause to be levied authorized millage, § 340.643a; to acquire property by eminent domain, § 340.711 *et seq.*; and to approve and select textbooks, § 340.882.” *Milliken v. Bradley, supra*, at 742 (footnote 20).

That delegation of responsibility was thought consistent with the “deeply rooted” tradition of “local control over the *operation* of schools” and the notion that “local autonomy [is] essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” *Milliken v. Bradley, supra* at 741-742 (citation omitted). Emphasis supplied.

The suggestion set forth in the brief of Petitioners that Michigan has a “combined” system of school finance, with some monies coming from “local sources” and some from “state sources”, Brief of Petitioners at 37, would, without more, perhaps be read to suggest that the same measure of delegation which has occurred with regard to day-to-day operation has also occurred with regard to financial matters. This is not the case. The state government of Michigan has not only retained ultimate responsibility for the funding of schools, but has also retained direct responsibility for

funding many aspects of the State's school programs and is a direct, active partner in those portions of the funding system over which a measure of local discretion does exist. The various mechanisms for the funding of education for Michigan's school children are discussed below in ascending order of the amount of involvement of the central State government in the particular finance mechanism utilized.

1. Direct Taxation Authorized by Statute or Charter.

With one notable exception, no Michigan school district is authorized by statute or constitution to levy any school tax solely by its own action. The power of Michigan school boards to levy *ad valorem* taxes by their own action is dependent in all cases upon the special authorization of such taxing power by a vote of the electors in the school district. Mich. Comp. Laws § 211.203(3) (Mich. Stat. Ann. § 763(3)).

Should the electors of a Michigan school board fail to authorize any school millage,² the district would not be entirely bereft of revenue. The Michigan Constitution provides for a basic property tax of fifteen mills, to be levied on a county basis. Mich. Const. 1963 Art. IX, § 6. Each county has a Tax Allocation Board. It is the function of that Board to allocate the fifteen mill tax between the county government, local townships, villages, cities, school districts, community college districts, intermediate school districts and all other divisions, districts and organizations of government.

² School property tax levies in Michigan are commonly known as "millages." The term refers to the number of mills of taxation per dollar of assessed valuation. Thus a tax of one mill is equivalent to a tax of ten cents per one hundred dollars of valuation, or one dollar per thousand dollars of valuation.

Thus, a local school board is reasonably assured of a small amount of millage, in some amount less than fifteen mills, as determined by the Tax Allocation Board, but even that amount is not within its control but that of the County Tax Allocation Board.³ Generally only two of the eight members of the county allocation boards are representatives of local school districts, and the manner of selection of those members is intended to diversify rather than concentrate the representative strength of local school districts in the allocation of tax revenues among local units by the county board. See, Mich. Comp. Laws § 211.205 (Mich. Stat. Ann. § 7.65).

The lone exception to the statement that a local school district has no inherent taxing power of its own is the two percent income tax excise authorized pursuant to statute for the School District of the City of Detroit. Mich. Comp. Laws § 340.689 (Mich. Stat. Ann. § 15.3689). That income tax, which came into being directly as a result of the present litigation, will be discussed below in the section of this brief relating to the state government's responses to financial emergencies of local school districts.

³ The actual revenue derived from county allocated millage is, like other millage, subject to the "Bursley Bill" formula. Mich. Comp. Laws §§ 388.1101, *et seq.* (Mich. Stat. Ann. §§ 15.1919 (501) *et seq.*). Thus while the *rate* of taxation is determined by the county government, the actual amount of revenue received from that rate is a function of a central state scheme of financing. Neither is in any way within the power of the local school district.

As the discussion of the Bursley Bill formula *infra* will show, the statutory scheme for school financing contemplates that a substantial amount of financing of schools above the basic fifteen mill tax limitation is required.

2. So-Called "Locally Voted Millage".

Michigan law does provide for the additional funding of schools through higher millages, which may be authorized by the electorate of a school district, up to a limitation on total taxation of fifty mills. However, these funds are not simply a system of locally determined taxation of local property. As Petitioner's Brief mentions ever so briefly, this locally voted millage is part of a scheme of "district power equalizing", enacted in Michigan in 1973 under the name of the Gilbert E. Bursley School Finance Act, commonly known as the "Bursley Bill". Mich. Pub. Act No. 258 (1973), Mich. Comp. Laws §§ 338.1101 *et seq.* (Mich. Stat. Ann. §§ 15.1919 (501) *et seq.*). In Michigan "district power equalizing" is nothing more than shorthand for pervasive state involvement in every component of school finance.

Under the pre-1973 Michigan system there were in fact two separate components to the financing of schools other than the county allocated millage. Article IX, Section 11 of the Constitution of Michigan, Mich. Const. 1963 Art. IX, § 11, established a School Aid Fund which was tied to the revenue from specific tax sources and which was by constitutional mandate to be used exclusively for school aid. The Fund was distributed primarily on the basis of a formula which weighted State Aid to some extent based on "state equalized valuation", or "SEV" (the taxable property available per child in each school district), but which in no way was dependant on whether or not the local school district electors did or did not authorize the levying of additional taxes. Furthermore, the revenue return from whatever local millage was voted in a given district was solely dependent on the value of the property within

that district against which that millage rate was charged. Thus, under the "pre-Bursley" system, there were in fact two separate components of school finance present, one State, distributed pursuant to an SEV formula, and one local, depending purely on local sources. The system was not unlike that which this Court approved in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

However, in 1973, the State of Michigan quite voluntarily chose to change this system of finance. The net effect of these changes was to make any distinction between "state money" and "local money" meaningless.

Under the new Bursley Bill, a locally voted millage does not draw revenue only from the local property taxpayers. Rather the State guarantees that each mill voted will garner a specified number of dollars per school child, regardless of the valuation of the property in the school district voting the millage, and regardless of the number of children in the district. Thus in 1975-76 the State guaranteed that for the first twenty mills of tax imposed (by the Tax Allocation Board and the electorate combined), each mill would generate \$42.40 per pupil, and that each of the next seven mills will generate \$38.25 per mill per pupil *regardless of the valuation of the district*.

Conversely, if a district does *not* vote millage, or receives no allocated millage, it receives no general State Aid. The State Government thus wields both the carrot and the stick in its relationship with local school electors; the local electorate possesses the power to vote substantial matching funds if they vote for a higher local property tax; at the same time, if they fail to do so, they cut themselves off from all general State Aid for education.

Amicus would argue that under such a scheme of school financing, any attempted distinction between State sources of revenue and local sources of revenue which attempted to suggest that they were in some fashion distinct would be meaningless. In all but the few very wealthy school districts in Michigan (whose valuations are so high that they exceed the guaranteed return without State Aid), when electors vote a school millage authorization, they are voting in greater or lesser part to receive an appropriation from the State School Aid Fund and the State General Fund, collected from Michigan State sales tax revenues on a state-wide basis and the Michigan Income Tax, as well as a higher property tax rate for themselves. The State of Michigan, for its part, uses every dollar that it spends on general school aid as leverage to induce higher voted millage rates in local districts.

Under such a circumstance there really are no autonomous local funding decisions made by the electorate; any such decision is pervasively influenced by the incentive, and the coercion, of the provision or withholding of state monies for schools. To talk of "state sources" or "local sources" in such a circumstance is truly to try to unscramble the egg; what really exists is a pervasive state scheme of school financing with a highly limited local option, an option which is especially limited as a practical matter because the failure to exercise it in a prescribed fashion cuts off the flow of State funds. The State then is at least an active partner in any so-called local financing decision in Michigan, and at most virtually dictates the outcome of that decision.

3. State Categorical Aid.

The pervasive involvement of the State in the financing of Michigan Public Schools is as strikingly illustrated by its provision of Categorical Aid to local school districts. Both directly and indirectly through the statutorily created intermediate school districts, the State makes grants to local districts for those targeted instructional programs which it alone has chosen to fund. While certain of the categorical grants contemplate the receiving district's providing a meager local share, the decision as to which education programs to fund and the level of that funding is entirely a matter of state control. Thus, the Michigan Legislature has allocated from the School Aid Fund an amount sufficient to provide grants to local districts for "comprehensive compensatory education programs," Mich. Comp. Laws § 388.1131 (Mich. Stat. Ann. § 15.1919 (531)); for teacher's salaries both in connection with "reading support service programs," Mich. Comp. Laws § 388.1143 (Mich. Stat. Ann. § 15.1919(543)) and in connection with "alternative education programs for pregnant persons," Mich. Comp. Laws § 388.1193 (Mich. Stat. Ann. § 15.1019 (593)); for experimentation, evaluation and reporting upon programs of special instruction for academically talented or gifted children, Mich. Comp. Laws § 388.1147 (Mich. Stat. Ann. § 15.1919 (574)); for "non-residential alternative juvenile rehabilitation programs;" Mich. Comp. Laws § 388.1148 (Mich. Stat. Ann. § 15.1919 (548)); and for "Secondary-level vocational education programs on an added cost basis," Mich. Comp. Laws § 388.1161 (Mich. Stat. Ann. § 15.1919 (561)).

The State's considerable involvement in public school finance is also revealed by its comprehensive plan of

categorical assistance for special education. The State funds special education programs, services and personnel,⁴ both directly from the School Aid Fund, *see*, Mich. Comp. Laws § 388.1151 (Mich. Stat. Ann. § 15.1919(551)), and indirectly through the intermediate school districts, *see* Mich. Comp. Laws § 388.1181 (Mich. Stat. Ann. § 15.1919(581)) and Mich. Comp. Laws § 340.298c (Mich. Stat. Ann. § 15.3298(3)). And though special education has been statutorily guaranteed handicapped persons since the 1973-74 school year, it is the State Legislature's decision alone to provide categorical aid to local school districts for a program which it has mandated.

II. WHEN MICHIGAN HAS BEEN CONFRONTED WITH THE FAILURE OF ITS FINANCING SCHEMES FOR SCHOOLS, EITHER PAST OR PRESENT, IT HAS NOT REACHED THROUGH ANY DELEGATION OF RESPONSIBILITY TO LOCAL AGENCIES, BUT THROUGH A SERIES OF TIGHTLY AND CENTRALLY CONTROLLED AD HOC RESOLUTIONS OF THE PARTICULAR PROBLEM AT HAND; WHEN THE COMPREHENSIVE SCHEME OF SCHOOL FINANCING DOES NOT WORK, THE STATE HAS NOT DELEGATED ITS CONSTITUTIONAL RESPONSIBILITY TO SUPPORT THE SCHOOLS, BUT HAS EXERCISED IT DIRECTLY.

To this point, *Amicus* has discussed the normal operation of the school financing scheme of the State of Michigan, demonstrating the pervasive influence of

⁴ Special education programs and services are defined in the Michigan School Code of 1955 to include "educational and training programs and services designed for handicapped persons operated by local school districts, intermediate school districts, the Michigan school for the blind, the Michigan school for the deaf . . . Handicaps include, but are not limited to, mental physical, emotional behavioral, sensory, and speech handicaps. Mich. Comp. Laws § 340.10 (Mich. Stat. Ann. § 15.3010).

the central educational authorities of the State of Michigan in every state-related revenue source. The relatively low level of delegation of State Power to local school districts, as compared with the comprehensive delegation of operational authority, is even more vividly demonstrated by the actions and the powers which the State has exercised in situations of financial emergency, in those situations where for one reason or another a school district has been unable to financially support the school program.

It is of particular interest that the State of Michigan Legislature has chosen to deal with these problems in an *ad hoc* fashion, by legislative enactment by what is for all practical purposes (although perhaps not strictly speaking) special legislation. Michigan has in the past chosen to deal with such situations directly, without so much as a permanent *State* administrative structure, much less a permanent or even *ad hoc* local administrative responsibility. Thus the Airport Community School District was forced to merge with another district pursuant to P.A. 1967 No. 239, as amended by P.A. 1968 No. 130. *Airport Community Schools v. State Board of Education*, 17 Mich. App. 574, 170 N.W. 2d 193 (1969). The Inkster School District received a state loan pursuant to Mich. Pub. Act No. 32 (1968), Mich. Comp. Laws § 388.201 (Mich. Stat. Ann. § 15.1916(101)). This legislation authorized reorganization or merger in the event that the loan was insufficient.

The latest such statute is Mich. Pub. Act No. 1 and 2 (1973) Mich. Comp. Laws § 388.251 *et seq.* (Mich. Stat. Ann. § 15.1919(281)), which provides for loans to

"The board of education of a school district that for the 1971-72 school year, because of a loss of at

least 5% of its state equalized valuation as a direct result of a decision on a property tax appeal was unable to complete or after adopting a resolution to close the schools after completion of less than 180 days, and partly as a result of borrowing money to complete 180 days in the 1971-1972 school year is rendered unable for the 1972-1973 school year to provide 180 days or unable to provide 900 hours of instruction as established by state board rule, is eligible to apply for an emergency loan from the state, not to exceed \$125,700." Mich. Comp. Laws § 388,253 (Mich. Stat. Ann. § 15.1919 (283)).

This statute, which obviously applied to a rather restrictive class of school districts, provides in subsequent sections a similarly stringent set of financial controls, which would result in the "reorganization" of the school district into other surrounding school districts in the event the district was unable to right itself financially. Mich. Comp. Laws §388.260 (Mich. Stat. Ann. § 15.1919(291)). Action by the State Board of Education to reorganize the district including a determination as to which contiguous district or districts should absorb the affected district would be final Mich. Comp. Laws § 388.266 (Mich. Stat. Ann. § 15.1919 (296)).

In the 1973 opinion of the Court of Appeals in this case, that Court found as facts a number of other instances in which the State reorganized school districts in the face of financial exigency. *Bradley v. Milliken*, 484 F.2d 215 (1973), *reversed on other grounds*, 419 U.S. 717 (1974). Other than those mentioned above, these included the merger of the wealthy Brownstone School District with three other districts to provide adequate funding, the merger of the Nankin Mills

District, and the merger of the Carver School District with Oak Park. 484 F.2d at 247-248.

Perhaps the most vivid indication of the consistent pattern in Michigan of dealing with financial emergencies by means of direct action of the central government of the State (typically through special legislative enactment) is provided within the history of the case now before the court. In the fall of 1972, the School District of the City of Detroit was under order of the District Court issued in the instant case to provide a full school year of instruction and prohibited from any lay off of any existing teachers. The School District also found itself woefully short of funds. The Detroit Board of Education brought an emergency motion before the District Court, asking that the State Treasurer be mandamusd to provide the necessary funds to continue the operation of the schools. In the conclusion of the brief filed in opposition to the motion, Petitioners Milliken et al., stated:

"The Michigan legislature is aware of the financial plight of the Detroit School District and there is every reason to believe that it will, given sufficient time to study and react to the problem, provide the means determined by it so that the pupils of Detroit will receive 180 days of instruction as required by Michigan law. The Joint Legislative Statement of November 30, 1972 is proof positive that this is so." *Bradley v. Milliken*, C.A. 35257 (E.D. Mich.) Brief of the Attorney General (filed December 6, 1972) at p. 35.

The statement of Petitioners Milliken et al., at that time proved to be prescient; the Michigan Legislature promptly passed Mich. Pub. Acts Nos. 1 and 2 (1973), Mich. Comp. Laws § 340.689 (Mich. Stat. Ann. §15.3689) which allowed the board of education of a

first class school district having boundaries which are coterminous with a city (Detroit is the only such district in Michigan) to enact an income tax by ordinance. This singular exception to the lack of inherent taxing power in local school boards was enacted in direct response to the dictates of the District Court below in this case in the context of a uniquely deep fiscal crisis.

From the above it can be seen that, in situations of financial emergency, Michigan's method of dealing with the issues of school finance is uniquely centralized. No comprehensive system exists; rather the pattern is to deal with each crisis by direct legislative enactment. Furthermore, the consequence in each case (with the exception of Detroit in the midst of the present litigation) has been the loss of the high level of independence which Michigan districts traditionally have had with regard to operational issues. In this aspect of school finance as well as those discussed above, Michigan's scheme of providing funds for schools can only be fairly described as highly centralized, not merely as to ultimate responsibility, but in operational reality as well.

CONCLUSION

This Court has, in a broad variety of circumstances, ranging from school desegregation, to determination of standards of obscenity, to standards for review of discharge from public employment, to determination of public housing and to legislative reapportionment, recognized the right of states to permit local communities to differ from one another in their approach to public issues and problems. Yet the touchstone of all of such cases is that they all arose in circumstances in which there was at least no present state plan to pro-

vide uniformity between localities with regard to the issue in question, if not indeed a specific state policy to permit diversity.

Michigan school finance is not such a case. The Michigan school finance system is one in which the state has not made any broad, general delegation of state responsibility. There is no overriding policy of local financial autonomy for this court to uphold.

As *Amicus* stated at the outset, this case in all probability turns on issues other than the school finance scheme in Michigan. *Amicus* respectfully submits that it would do an injustice to all those vitally concerned with the financing of Michigan schools if this Court based its opinion in this case upon a desire to respect local autonomy with regard to school finance. Such a policy of local autonomy with regard to school finance simply does not exist in Michigan.

Respectfully submitted,

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February 11, 1977